Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term 1995

GARY VICTOR DUBIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit In Appeal From The United States District Court Of Hawaii, Visiting District Court Judge Manuel L. Real Presiding

PETITION FOR WRIT OF CERTIORARI

Gary Victor Dubin
Member, Supreme Court Bar
No. 84958-022
Lompoc FCI
3600 Guard Road
Lompoc, CA 93436
(805) 736-4154

Petitioner

124 pp

QUESTIONS PRESENTED

1. Did Congress in enacting 26 U.S.C. §§61, 6011, and 6012 intend to define individual gross income for filing purposes to include a sole proprietor's gross business receipts, exclusive of subtracting business costs, and to make failure-to-file a crime based solely on gross receipt calculations by enacting 26 U.S.C. §7203; and, if so, is such a legislative scheme constitutional, within the power granted Congress by the Sixteenth Amendment in accordance with the Supreme Court's past interpretation of the Income Clause?

2. Does Rule 7(a) of the Federal Rules of Criminal Procedure or the Indictment Clause of the Fifth Amendment require indictment for all 26 U.S.C. §7203 prosecutions, since, with the addition of a term of supervised release pursuant to 18 U.S.C. §3583, failure-to-file defendants are now exposed to the possibility of imprisonment for each offense for more than one year when U.S.S.G. §7B1.4 revocation imprisonment is added to the maximum sentence that can be served?

3. Does the timely filing of IRS Form 4868 marked with zeros, reporting no income tax due, satisfy the return requirement of 26 U.S.C. §7203, and would conviction nevertheless of a failure-to-file defendant who had marked Form 4868 with zeros also deny equal protection under the Due Process Clause of the Fifth Amendment in a Circuit whose Court of Appeals had earlier held en banc that 26 U.S.C. §7203 defendants marking returns with zeros cannot be prosecuted under that Section in its district courts?

4. Is 26 U.S.C. §7203 void for vagueness on its face or as applied to a failure-to-file defendant charged, tried, convicted, and sentenced based exclusively on sole proprietor gross business receipts in Petitioner's circumstances, because that Section gives inadequate notice to taxpayers and to system personnel, in violation of the Due Process Clause of the Fifth Amendment, failing to specify the actual filing requirement imposed, referring only obscurely to "what is required

QUESTIONS PRESENTED – Continued

under this title", the entire Internal Revenue Code and its Regulations, misstating the maximum possible sentence by one-half, and misstating the maximum possible fine by three-fourths?

5. Since *Cheek v. United States*, 498 U.S. 192 (1991), requires district courts to consider evidence of subjective good faith intent negating 26 U.S.C. §7203 willfulness, is it a violation of Congressional intent and the Due Process Clause of the Fifth Amendment for a trial judge to prevent a failure-to-file defendant from proving lack of willfulness by denying him use of his records and exhibits at trial, stopping him from cross-examining as to good faith, refusing to weigh reliance on IRS forms, instructions, and advice – and to instead try him pro se while ill, unprepared, sedated, sleepless, and jailed, and convict based on pyramiding objective inferences of intent and on secret, false, ex parte hearsay obtained from prosecutors outside trial impeaching credibility?

6. Is it a violation of the Due Process Clause of the Fifth Amendment and the Right To Counsel Guaranty of the Sixth Amendment for a trial judge, as a pretrial sanction for supposed dilatory conduct, to deny a brief continuance requested two weeks before trial to permit a pro se criminal defendant who waived counsel without a *Faretta* warning on the dangers of self-representation, found ill and excusably unprepared by a magistrate judge three weeks before, time to retain defense counsel?

7. Is it a violation of the Due Process Clause of the Fifth Amendment and the Confrontation Clause and Right To Counsel Guaranty of the Sixth Amendment, or such a departure from accepted trial proceedings so as to invoke the Supreme Court's supervisory power, for a visiting trial judge to hand-pick a criminal case nonrandomly from the trial calendar and self-reassign it to himself, using his senior status to take the trial away from the magistrate designated by local rules to try all 26 U.S.C. §7203 cases, and, once self-selected,

QUESTIONS PRESENTED – Continued

to have ex parte contact through his clerk with prosecutors just prior to trial, receiving false information ultimately causing conviction, concealed for three months until sentencing, using that information to jail a pro se defendant during trial and then to enhance his sentence?

8. Is it a violation of the Due Process Clause of the Fifth Amendment and its Equal Protection Guaranty, or such a departure from accepted appellate proceedings so as to invoke the Supreme Court's supervisory power, for a circuit panel to give sweeping deference to the fictitious findings of a trial judge through application of a purely clear error, substantial evidence standard, where such findings are flatly contradicted by the trial record, were adopted verbatim from the PSR which had adopted them verbatim from after-trial prosecutor submissions to probation, and involve questions of constitutional law and mixed questions of law and fact customarily granted de novo review, and for the panel to refuse to consider legal issues properly raised and even to consider a motion to recall mandate, and instead to rescind its filing after ignoring a timely affidavit of disqualification for cause?

9. May a party, by submitting an affidavit of disqualification, complaining of judicial disability, similar to procedures for challenging bias or prejudice presently, or by any other appropriate means, directly seek to enforce in pending cases the Good Behavior Clause of Section 1 of Article III of the Constitution and 28 U.S.C. §§44(b) and 134(a), or the Due Process Clause of the Fifth Amendment, by raising the issue of the competency of trial or appellate judges, with appropriate discovery rights, to whatever extent consistent with the orderly administration of justice in individual proceedings?

RULE 14(b) IDENTIFICATION OF PARTIES

Petitioner is 58 years old, a Member of the California and Hawaii State Bars, and the Bar of the Supreme Court of the United States, has no corporate affiliations, and has been a sole practitioner for 32 years as a civil trial attorney except while holding research and teaching positions at Stanford, Berkeley, Denver, Harvard, and U.S.C., and at the RAND Corporation in law and social science research.

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I. JURISDICTIONAL STATEMENT

District Court entered Judgment January 20, 1995. Notice of Appeal filed January 20, 1995. Memorandum filed December 22, 1995. Petition for Rehearing filed January 19, 1996, following extension request January 2, 1996. Rehearing denied March 8, 1996. Mandate issued March 18, 1996. Court has jurisdiction, its Rules 10, 13, 28 U.S.C. §1254(1).

II. RELEVANT GOVERNING LAW

Pertinent text in Appendix: *Constitution*: Article III, §1; Fifth, Sixth, Sixteenth Amendments. *Statutes*: Title 18, §§3571, 3583; Title 26, §§61, 6011, 6012, 7203; Title 28, §§44, 134. *Sentencing Guidelines*: §§2T1.2, 2T4.1. *Rules*: 7, 58, F.R.Cr.P.

III. STATEMENT OF THE CASE

Information was filed August 13, 1993, for failing to file 1986, 1987, 1988 tax returns, violating 26 U.S.C. §7203. Visiting Judge Real convicted Petitioner after bench trial of three misdemeanors, sentencing consecutively 30 months, one year supervised release. Petitioner appealed. Affirmed.

Judge Real, arriving in Hawaii, before hearing witnesses or seeing evidence, started trial admonishing "this case is not a complex case, it's failure to file income taxes, that's all. There's no complexity to it at all, it's very, very simple".[1]

Petitioner appears to be the first person prosecuted in American history for obeying the IRS.

Always preparing his own returns,[2] Petitioner formed belief from IRS publications his duty to file returns depended on *net business income*.

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[1] Reporter's Transcript ("RT") 9/13/96, p. 6; prosecutors called case "complicated" although "only a misdemeanor", arraignment, RT 8/27/93, p. 4. Magistrate agreed, 10/6/93 Order.

[2] 1962-1984, except when retired 1979-1982; see *Bloch v. U.S.*, 221 F.2d 786 (9th Cir. 1955) (taxpayer not required to hire accountant).

Petitioner, like many taxpayers, referred to IRS' own "Tax Guide For Small Business" in preparing returns, which consistently explained to subtract costs from business gross in calculating individual gross income:

> Sole Proprietorship. If you are a sole proprietor, figure the net income or loss from your business on Schedule C (Form 1040). If your business has net income, it generally becomes part of your gross income on Form 1040. If your business has a net loss, it generally can be deducted from other income when figuring your gross income.[3]

That method of calculating individual gross income was reinforced in Petitioner's mind by the very structure of Form 1040 historically, instructing to total gross income be *adding* to wages, etc., business income *or loss*.[4]

Petitioner's view was also reinforced by 1040 who-must-file instructions, if "you have net earnings from self-employment income of at least $400".[5]

When, for instance, ten years before prosecuted, Petitioner delayed filing 1982 1040 until October 15, 1984, he told IRS income "less than the amount required for filing" on its inquiring Form 4901, writing in "self-employed income below amount required for filing (loss)", and never received further inquiry.[6]

But Petitioner did not rely on silence alone. When IRS Fresno received a bank-interest report and inquired as to his 1040, Petitioner explained, and was told:

> We received your letter concerning Form 1040 for the tax periods ending December 31, 1985 and 1986. We have corrected our records to show that you are not required to file for 1985 and 1986 Form

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[3] Defendant's Trial Exh. ("D. Trial Exh.") 1(5) (1984).

[4] D. Trial Exh. 1(4) (1986 Form 1040) (See App. 36).

[5] D. Trial Exh. 1(2) (1983, 1988, 1989 IRS 1040 instructions)

[6] D. Trial Exh. 1(3) (IRS: "If you are not required to file the form for the tax period shown, please complete §II on the back").

> 1040. *The reason this problem occurred is because* your bank has the interest as individual and it should be reported as business income. We apologize for the delay in responding and any inconvenience we may have caused.[7]

Yet Petitioner was charged, tried, convicted based on business gross *receipts*, not even business gross *income*, for IRS' summation witness admitted numbers in Information and IRS' evidence gross receipts,[8] prosecutor based theory of case on gross receipts only and even withdrew net income exhibits,[9] Judge Real excluded other evidence, ruling filing duty based "on gross receipts" and "not on net income" in cutting off cross-examination,[10] and calculated sentence by 10% of gross receipts even though Guideline specified income,[11] and even Court of Appeals, affirming, held business net "irrelevant".[12]

Those amounts, however, included unearned retainers, pass through payments from clients to other firms and vendors with no premium added, trust funds, costs for utilities, books, offices, computer research, depreciation, and the like.[13]

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[7] D. Trial Exh. 1(6) (App. 33) (refers to Petitioner's 12/2/88 letter referencing 5/20/88 letter explaining why had no filing duty (App. 32) before 1987 return (w/ext.) and 1988 returns due, just as done in 1984, before returns due, responding to IRS 5/9/88 letter (App. 31)) Same true for 1987, 1988 years; D. Trial Exh. 1(7-9) (see, e.g., 9/90 exchange over 1988 return (Apps. 34, 35)).

[8] RT 9/14/94, pp. 62-70 (Mr. Bain: "Alleged Gross Receipts").

[9] RT 9/14/94, p. 76.

[10] RT 9/13/94, p. 56 ("MR. DUBIN: But failure to file involves whether there was an obligation to file – THE COURT: That's on gross receipts. Not on net income," *ibid*).

[11] RT 1/13/94, p. 20.

[12] App. 3, p. 3 ("Dubin's net income fell below $400").

[13] Vendors and other firms presumably paid income tax.

Subtracting those amounts, Petitioner's *individual gross* income derived from business for all three years combined, with personal income, was a *negative* $398,900.34.[14]

Question is not whether Petitioner would file, but whether would delay filing, for would always file 1040s with loss eventually to track depreciation, carry forward losses, meet loan needs, informing IRS no income on Form 4868,[15] subsequently on Form 8176 routinely for more than a decade.[16]

Petitioner not only obeyed IRS directions. He was in IRS offices being audited for 1986, 1987, and 1988 before any returns for those years were even due.

On May 12, 1987, IRS began audit of 1984 return; immediately requested 1986 return, with extension not due. He explained would delay filing 1986 1040, having no net business income due to losses and depreciation, would wait until 1984 year audit completed, to file, since might alter allowable deductions.[17]

Due to scheduling of both Petitioner and Examiners, audit for 1984 became delayed, then prolonged due to illness of Petitioner's only son, who earlier almost died, then was diagnosed with AIDS, which shattered Petitioner's life as he watched Scott, an "A" student at U.S.C, on his way to law school, wither away and die.

As audit proceeded, IRS requested information for current years, was provided data for 1986, then 1987, then 1988;

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[14] See App. 38.

[15] Government Trial Exh. ("G. Trial Exh.") 2 ("income tax balance due: 0"); G. Trial Exh. 3 ("income tax balance due: 0").

[16] D. Trial Exhs. 1(7) ("no net income [1986] 12/2/88"); 8 ("I did not file a [1040] return because I believe that my professional income was below filing requirements [1987] 7/15/89"); 9 ("net earnings from self-employment income below and before filing requirement [1988] 8/25/90").

[17] D. Trial Exh. 1(10) ("Documents Requested: 1986 return").

eventually it was agreed to expand audit to those years, that returns would be filed after each year audited.[18]

In IRS offices, Petitioner watched filing deadlines for 1986, 1987, 1988 run out, said delaying filing 1040s, and why; was never told if was wrong:

> BY MR. DUBIN: Q. Did you in any way, in writing, or orally at any time, when I told you about why I didn't feel I had a filing duty, I think to use your words before, did you tell me that I was incorrect? A. [By IRS EXAMINER NAKASONE] No, I did not. Q. Did you tell me I had made a mistake? A. No, I did not. Q. Did you encourage me to do any research on the subject? A. No, I didn't.[19]

Understandably delayed, although IRS had all his tax records for five full years before prosecution,[20] his son's condition worsened, was unable to respond to Examiner's calls; the case was taken over by Criminal Investigation Division who had priority program to find attorney in each state for tax enforcement. Petitioner became Hawaii prey.[21]

Petitioner would have completed audit for the three years, showing net business losses well below any 1040

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[18] Government files, G. Trial Exh. 6D1(8) referenced agreement to file after audit completed, Examiner admitted, but Judge Real stopped questioning as "irrelevant", RT 9/14/94, pp. 38-40.

[19] RT 9/14/94, pp. 48-49 ("went on throughout audit", *id.*, 40).

[20] Dismissal Motion Papers (8/30/93) (D. Trial Exh. 1 Memo., at 14-15). RT 9/14/94, pp. 35-36 ("Q. [Dubin] So, although you were doing the '84 return, you were asking me for information for some of the other years as well, isn't that true? A. [Nakasone] Yes. A. And I did give you that information, didn't I, the information you asked for for those years, '86, '87, for example? A. Yes you did.").

[21] See 57 Criminal Law Reporter 1215.

Schedule C filing duty, had he not been preoccupied with attempting to comfort, care for, and save his son's life.[22]

For decades U.S. Attorneys have been stretching ethics by lobbying federal judges to hammer nonfilers.[23] Petitioner's case demonstrates such separation-of-powers violations lead to abuses.

The Information ignored sole-proprietor status, making it appear take-home income had been $1,643,900. Prosecutors knew was instead gross *receipts*.

Capitalizing adroitly on exaggerated figures to hang high profile attorney, prosecutors issued "news release" on arraignment day, making it appear charges had grand jury scrutiny, when, according to magistrate, referenced indictment "never returned".[24]

Unable to indict, prosecutors achieved same prejudicial effect, severely damaging law practice dependent on referrals and economic means of defending himself.

Trial was set for August 1994. Petitioner became ill with chronic back pain in April, worsening in July. Magistrate found him "excusably unprepared", representing himself, granted trial continuance, based on medical reports; with no objection from prosecutors who drafted order:

> failure to grant it would make the continuation of proceedings impossible due to the health of the Defendant, and would deprive the Defendant of

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[22] See Apps. 37, 38. Compare RT 9/14/94, p. 101 ("THE COURT: It [son's illness] has nothing to do with this lawsuit"), FOF 23 (basing intent on "conduct during audit process") (App. 1).

[23] Minutes, 2/9/73 IRS conference secured via Freedom-of-Information Act 3/8/94 (App. 39).

[24] See App. 28. Release violated 28 CFR 50.2 (App. 25).

> counsel of his choice and reasonable time necessary for effective preparation.[25]

Follow-up medical evidence showed back problems still severe. Judge Real, lecturing Magistrate, refused to extend continuance so Petitioner could retain counsel.[26] Petitioner consulted Dr. deVegvar:

> I evaluated Mr. Gary Dubin on September 9, 1994 at which time he was feeling depressed and accompanying passive suicidal ideation. . . . Mr. Dubin was suffering from Major Depression resulting from his son's death two years ago with increase in depressive symptoms over the past several weeks.[27]

As his condition worsened she had him admitted to hospital morning of trial on emergency basis: "Mr. Dubin did not and could not admit himself. It was my judgment. . . . [T]he death of a child is one of the most devastating events a human being may experience and it may take years to recover from such a loss."[28]

Informed of the admission immediately, although he would later deny being told,[29] Judge Real ordered a Government doctor examine Petitioner. But prosecutors telephoned Dr. deVegvar, hospital informing them she was admitting

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[25] Order 8/22/94 continuing trial to 9/13/94. Petitioner waived counsel at arraignment told by Magistrate only: "[I]t is this Court's very strong advice that you proceed with counsel in this matter." RT 8/27/93, pp. 1-2. No further discussion on waiving counsel appears anywhere.

[26] Counsel, hired to seek continuance, told Judge Real Petitioner "was not prepared to present evidence" or "to cross-examine witnesses"; "he was incompetent to act as his own attorney", should "be given one week to obtain counsel", Affidavit of Cassiday (9/9/94). Judge Real held five minute hearing, allowed no medical testimony, concluding "he's chosen to represent himself", RT 9/12/94, p. 2.

[27] New Trial Motion 1/13/95, exh. 2, p. 1 (12/22/94).

[28] New Trial Motion, *id.*, exh. 2, pp. 1-2.

[29] "He's at Queen's Hospital", RT 9/13/94, p. 2 (Cassiday); "[Cassiday] didn't tell you where I was? No, he didn't," *id.*, 104 (Dubin/Real).

physician, bullied her, despite physician-patient privilege, into disclosing condition, learning she admitted him for one to two weeks;[30] they also contacted emergency room, separate entity from hospital, were told by a Dr. Wakuzawa, who had no knowledge of Petitioner's admission, only that x-ray of neck identified no problem, again invading physician-patient relationship.[31]

Prosecutors, knowing Petitioner admitted by Dr. deVegvar, not Dr. Wakuzawa, not being discharged, nevertheless told Judge Real through his clerk Petitioner had been faking his illness, was being discharged.[32]

When Judge Real received message, he rescinded his examination order and ordered him arrested, brought to trial immediately, Petitioner learning of false report three months *after* trial when read PSR:

> 24. According to AUSA Osborne, when he called Queen's Medical Center to make arrangements for the Government to examine the defendant, he was advised by the duty doctor that the defendant was being discharged because he had no physical medical condition that would allow him to remain in the hospital. Subsequent to receiving this information from AUSA Osborne, the Court found [in absentia] that the defendant was physically and mentally fit to participate in the non-jury trial, and immediately issued a no bail warrant. [Brackets Supplied]

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[30] New Trial Motion, *supra*, exh. 2, p. 2 ("I then told . . . [Osborne] I had admitted Dubin to Queen's Hospital that morning" for "one to two weeks"). Prosecutor Peyton admitted Osborne *and he* were on the telephone with Dr. deVegvar the morning of 9/13/94, RT 1/13/95, p. 6.

[31] Dr. Wakuzawa, prosecutors knew, not admitting physician. "I was not aware that he was admitted to the hospital", RT 1/9/95, p. 6.

[32] Prosecutors finally forced to admit in Answering Brief with cryptic brevity: "the fact that Mr. Dubin was being discharged from the hospital was related, by the United States, to the court clerk," at 27.

Knowing judge had volatile reputation, and providing him with false information as to Petitioner's health and intentions, prosecutors literally spun him like a toy top, setting stage for *prejudged* trial.

First, Judge Real refused to extend start of trial a single day, as pretrial sanction, scoffed Petitioner "had plenty of time to get a lawyer".[33]

Second, Judge Real made no inquiry into his health whatsoever, welcoming him straight from the hospital in handcuffs with only "All right- . . . you're here."[34]

Third, Judge Real refused to allow Petitioner his files during trial, arresting him at hospital, petitioner having to rely instead on attachments to 1993 motion in court file already.[35]

Judge Real noon first day requested friend of Petitioner go to residence to secure files. Files were given Petitioner late next morning, after most witnesses testified. The two boxes secured, of thirteen needed, only contained duplicates of Government exhibits.[36]

Nevertheless, Judge Real wrote in his trial findings:

> FOF 11: DUBIN complained that he did not have his records. Those records were brought to him during the morning of September 13, 1994, by a friend, also an attorney, and those records were available to DUBIN throughout the trial.

The actual trial transcript at the end of the first day contradicts Judge Real's whitewashing:

> 9/13/94: Mr. Clements has gone to your house to get them * * * and he can bring them to wherever the

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[33] RT 9/12/94, p. 2 ("Mr. Dubin has just been very, very lax").

[34] RT 9/13/94, p. 4.

[35] 19 motion exhibits admitted, RT 9/14/94, p. 116.

[36] Only "records" Petitioner had first day were Judge's copy of Government exhibits. "Well, Mr. Dubin, I can't help that. You had – since January you've had all of these records with which to prepare for trial. Again, as I tell you, this is not Burger King." RT 9/13/94, p. 106.

> Marshals are going to take you [Halawa State Prison] and take care of that problem.[37]

Fourth, Judge Real ignored Petitioner sedated:

> 9/13/94: Feeling depressed with passive suicidal ideation. Now taking Zoluft and Ativan. . . . Cognition-impaired concentration. Patient taken by Marshals from Hospital without being discharged.
>
> MR. OSBORNE: Was the Court advised of a problem with medication? THE COURT: Yes, we have no written prescription, or dosage, or anything from the hospital, so I'm not going to get involved in that kind of a situation. We don't know what the medication is about or anything else.[38]

Fifth, Judge Real paid no attention to the effect of confinement on Petitioner's ability to represent himself, not being allowed to make calls, secure witnesses, even sleep.[39]

Judge Real was apparently attracted to Petitioner's case, although record does not disclose why, only that he reassigned case to himself.[40] Petitioner had been misinformed by clerk reassignment random. Petitioner expressed willingness to have Judge Real as judge, not knowing he handpicked case or actual reputation for unfair trials, *if* a continuance granted.

Prosecutors' medical hearsay had intended effect. Judge Real scoffed, harangued at his credibility continually: "There was no reason that you went to the hospital except to escape trial."[41] Judge Real accepted prosecutors' false story of discharge from hospital:

> FOF 6: [T]he duty doctor at the hospital said DUBIN was being discharged because he had no

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[37] *Ibid.* see footnote 58, *infra.*

[38] New Trial Motion, *supra,* exh. 4 (hospital M.D. notes). RT 9/13/94, p. 26. See prescriptions, at exh. 6: "POSSIBLE SIDE EFFECTS: Common: Drowsiness, weakness, dizziness . . . stomach upset".

[39] See App. 41. He was even jailed during recesses.

[40] See App. 27. District had no reassignment General Orders.

[41] RT 9/13/94, p. 103.

> physical disorder. The Court found that DUBIN was physically and mentally fit to participate in a non-jury trial and issued a bench warrant for his arrest. FOF 7: The Court was further advised that DUBIN, immediately upon his discharge, had committed himself to the psychiatric side of Queen's. . . .

When Judge Real made these findings originally, had only ex parte hearsay what "hospital duty doctor" said. Petitioner when learning of unethical communication filed motion for new trial at sentencing.

After-trial testimony of emergency room physician proved had no knowledge of hospital admission or any medical knowledge except as to neck which later turned out also incorrect.[42]

After true medical facts presented at sentencing, Judge Real angrily sought to discredit admitting physician, Dr. deVegvar. He denied motion for new trial, debunking Dr. deVegvar's credibility even *before* she could testify – ignoring emergency room records as well noting sent back to hospital bed in wheelchair from emergency room:[43]

> COURT: [Dr. deVegvar] given a report and I've read that report, and I've read the notes and I just don't think she's candid. I think it is made up. Okay? MR. CASSIDAY: Well, Your Honor, I think I should call her to –. COURT: Be my Guest.[44]

Judge Real railroaded the entire trial process.

First, only minutes into trial he rejected out-of-hand Petitioner's claim of good faith reliance on IRS:

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[42] Footnote 31. After trial, MRI revealed severe osteoarthritis.

[43] New Trial Motion, *supra*, exh. 6 ("emergency department notes"). When Judge Real ordered trial recess first day, he instructed Marshals if "Dubin needs a wheelchair to come back, you put him in a wheelchair, okay?", RT 9/13/94, p. 23.

[44] RT 1/13/95, p. 4.

> You're enough of a lawyer that knows there's no estoppel against the government by reason of what some employees might do or don't do, okay?[45]

Judge Real was wrong. Courts recognize "entrapment by estoppel" where government employees inadvertently lead one to misunderstand the law.[46] However, estoppel is irrelevant in 26 U.S.C. §7203 prosecutions because specific intent element of crime.[47]

Second, Judge Real was unwilling even to admit Petitioner being audited when returns due, for that obviously would confirm lack of willfulness: "You were not in the IRS office until after you had not filed '86, '87, and '88 returns."[48] Record shows otherwise. FOF 14 recites "audit started May 1988", by Judge Real's own calculations before 1987 (with extension), 1988 returns due. However, even those findings in error, for first audit letter, also in record, came from Ms. Tsuha, dated May 12, 1987, before 1986 return (with extension) due. Even Ms. Nakasone admitted at trial that, when she took over, 1987 and 1988 returns not yet due.[49]

Third, Judge Real was rigidly certain Petitioner had filing duty, but vacillated where it was. He first found Petitioner guilty because had "net income above $400", but excluded evidence of net income.[50] Then, he switched to guilty because "ate meals" and had "draws," confusing partnerships with sole proprietors, admitting during one witness-interrupting

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[45] RT 9/13/94, p. 13.

[46] See *U.S. v. Spires*, 79 F.3d 464, 466 (5th Cir. 1996).

[47] *Cheek v. U.S.*, 498 U.S. 192, 201 (1991).

[48] RT 1/13/95, p. 35 ("MR. DUBIN: All right. Your Honor, that is incorrect. . . . COURT: – that may be incorrect, but it's in the record. MR. DUBIN: – may I show you the letters? COURT: No.").

[49] RT 9/14/94, p. 22.

[50] RT 9/14/94, pp. 192-193. 120 pages earlier when Petitioner asked if being charged with more than $400 of net income, Judge Real said: "No, what I'm charging is that you had more gross income than is the bottom line for filing", *id.* at 72.

episode did not even know Schedule C applied to Petitioner.[51] Then he found Petitioner violated 26 U.S.C. §6012, which does not define "gross income" but merely sets threshold filing amounts, begging question.

Fourth, Judge Real drew inferences from having filed for 1984, with no income, yet on time, to show knew had filing duty even with loss, but ignored consistent history filing on delayed basis most such other years, such as 1982, telling IRS reasons for delaying ten years before prosecution, ignoring why, even with loss, Petitioner might file on time, such as for 1984 when needed current returns for loans. Judge Real also based inferences on credentials, harping Petitioner graduated law "Order of Coif".[52]

Fifth, Judge Real constantly interrupted witnesses about to say something helpful to Petitioner, preventing testimony showing no net income and no taxes owing,[53] showing Petitioner relied correctly on IRS,[54] showing second Examiner believed as he did if no business net no filing duty.[55]

Ironically Judge Real nor prosecutor were able to prove elements of crimes, even in such Star-Chamber proceedings.[56]

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[51] RT 9/14/94, pp. 44, 164; Recalling structure of 1040, reason sole proprietor does not pay himself salary is by including salary on line 7, would show salary as business deduction on Schedule C, thus showing additional loss on line 12, which would equal any gross income addition on line 7, which would not change "individual gross income" figure on line 23. See App. 36.

[52] RT 9/14/94, p. 159 ("MR. DUBIN: How clear is the Code, I would then ask. COURT: To a lawyer, the Order of the [sic] Coif? Please, Mr. Dubin, don't try to do that to me", *ibid.*

[53] RT 9/13/94, pp. 56-58 (Judge Real refusing questions).

[54] RT 9/13/94, pp. 100-102 (Judge Real refusing questioning of custodian of records submitting IRS Fresno exculpatory letter).

[55] When tried to show Examiner misled him due to similar understanding of filing duty, Judge Real refused question, RT 9/14/94, pp. 42-44. She then admitted had Petitioner had no net IRS would not have referred for prosecution. RT 9/14/94, p. 55.

[56] "I have no evidence [of intent]", RT 9/14/94, p. 72.

Petitioner moved for acquittal; denied. The prosecutor amazingly appeared to convince Judge Real Petitioner had burden of proving innocence.[57]

Although almost all trial findings were *adopted* verbatim from PSR, which probation adopted verbatim from prosecutors, even though flatly contradicted by trial record, Petitioner's appellate panel remarkably showed sweeping deference, inquiring only "if a rational trier of fact could have found the essential elements of the offense" based on those findings.

Willfulness findings were based on mistaken understanding Petitioner had files and exhibits with him entire trial,[58] and not being audited by IRS until returns past due, and a lawyer with "the Order of the [sic] Coif" knows everything.[59] The panel had more difficulty with rejection of reliance on IRS. It said nothing about forms and instructions, but as to what IRS wrote, gave deference, *guessing* he weighed such evidence "apparently".

Second, panel merely parroted erroneous *continuance* findings denying delay: that request came only "morning of trial", when made weeks before but not heard until day before;[60] that he had continuances before, although record

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[57] When Petitioner reminded Judge Real Government had not shown anything except gross receipts, prosecutor convinced Judge Real "that's the duty of the taxpayer to show the gross filing requirement", RT 9/14/94, p. 75. But see *Sandstrom v. Montana*, 442 U.S. 510 (1979) (unconstitutional to shift burden).

[58] Reference of Judge Real in FOF 11 to Petitioner having "records" first day could only mean Judge's copy of Government exhibits: "MR. DUBIN, Excuse me, Your Honor, I don't have the exhibits. . . . COURT: [you] can have my copy." *Id.*, 15.

[59] RT 9/14/94, p. 76 ("you are also Order of the Coif").

[60] Petitioner 8/29/94 filed request to extend 8/22/94 continuance, his retained counsel 9/9/94 filed additional continuance request.

shows each side with one until Petitioner found ill and excusably unprepared;[61] that case pending over one and one-half years, a six-month error in math.

Third, *hospital* findings were contradicted by medical records, Judge Real relying on prosecutors' ex parte well-poisoning instead, claiming: Petitioner had "checked himself" into hospital, ignoring admitting physician and contrary nationwide hospital policy; that seeing psychiatrist was only last-minute ploy, ignoring testimony of family physician that psychiatric referral considered well before coming of Judge Real, when Petitioner's son died; that Petitioner was being discharged from hospital, ignoring contrary medical records.

Fourth, panel never questioned Judge Real's attempt to cleanse record by *competency* findings he had examined Petitioner before trial and found "demeanor and behavior" supposedly "entirely normal" and "mentally competent and physically fit." Record shows no inquiry[62]

Fifth, *income* findings are unsubstantiated. Even though Judge Real used "gross receipts" to measure "tax loss" to determine sentence, panel ignored Guidelines use "income";[63] in other findings found business gross income less than measure used for "tax loss sentencing".[64]

Sixth, *credibility* findings reject sincerity of Petitioner and Dr. deVegvar. Judge Real chose to believe ex parte messages before trial. Panel ignored medical records, concluding only "we reject as frivolous Dubin's unsubstantiated

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[61] 12/17/93 (to 5/3/94); 4/26/94 (to 8/2/94).

[62] Later Judge Real told Petitioner: "You look a lot better than you did before. You sound a lot better." RT 5/10/95, p. 5, filed 5/25/95.

[63] Panel declined to consider "for the first time on appeal" misapplication of §2T1.2, overlooking (App. 3, p. 9) it had already concluded Petitioner had objected below. But see *U.S. v. Moore*, 997 F.2d 55 (5th Cir. 1993).

[64] FOF 22: "gross business income": $533,725.39, $633,594.38, $330,297.68 (1986-1988), FOF 39: $643,032, $469,490 (1987, 1988).

claims of misconduct by either the district judge or the prosecutor".[65]

Seventh, *sentencing* findings failed to resolve PSR disputes,[66] or justify maximum consecutive sentencing as required,[67] yet panel ignored that omission, and even worse obvious unconstitutionality of supervised release terms.[68]

IV. LEGAL ARGUMENT

The District Court had no subject matter jurisdiction,[69] while denying a fair trial, and the Court of Appeals had no subject matter jurisdiction, while denying a fair hearing.

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[65] App. 3, p. 9; see prosecutors' judicial admission, footnote 32.

[66] Rule 32 cases cited by panel inapposite: *U.S. v. Helmy*, 951 F.2d 988 (9th Cir. 1991) (sentencing court stated was not relying on challenged facts) and *U.S. v. Rigby*, 896 F.2d 392 (9th Cir. 1990) (trial judge concluded no challenge to "any information" in PSR, just to inferences drawn). Judge Real not competent to sentence, having forgotten material facts, such as in IRS offices before returns due; see *U.S. v. Makes Room*, 49 F.3d 410, 415-416 (8th Cir. 1995) (reversal required where sentencing judge not familiar with record).

[67] 18 U.S.C. §§ 3553(a), (c), 3584(b), read together, require consideration of circumstances, and reasons for consecutive sentencing, which Judge Real never did; see, e.g., *U.S. v. Scarano*, 76 F.3d 1471 (9th Cir. 1996).

[68] Panel would not consider constitutionality of supervised release terms, although Fifth Circuit reviewing identical terms in *U.S. v. Stafford*, 983 F.2d 25, 28-29 (5th Cir. 1993), found clear violations of both Fourth and Fifth Amendments ("providing financial information, filing all past due tax returns, and paying all past due taxes owing").

[69] Each of Petitioner's nine points is *jurisdictional*. Congress has either been prevented power by Constitution or has not given power to courts. Each point raised below, but defects in subject matter jurisdiction may be raised any time, Rule 12(b)(2), F.R.Cr.P. There is split among Circuits whether constitutional challenge presents jurisdictional issue. Compare *U.S. v. Walker*, 59 F.3d 1196, 1198 (11th Cir. 1995), with *U.S. v. Baucum*, 80 F.3d 539 (D.C.Cir. 1996). Dispute is over two decisions, *Blackledge v. Perry*, 417 U.S. 21 (1974), *Menna v. New York*, 423 U.S. 61 (1975).

1. Business gross is not individual gross

Sixteenth Amendment gave Congress power "to lay and collect taxes on incomes, from whatever source derived". Starting with *Stratton's Independence, Ltd. v. Howbert,* 231 U.S. 399, 415 (1913), Court drew distinction between income from labor alone and income derived from investment in capital: "the earnings of the human brain and hand when unaided by capital * * * are commonly dealt with in legislation as income", but business gross is not, and in *Doyle v. Mitchell Bros. Co.,* 247 U.S. 179, 185 (1918), held income derived from business must represent gain, not loss to capital investment: ("we must withdraw from the gross proceeds an amount sufficient to restore the capital value").

Similarly, *Eisner v. Macomber,* 252 U.S. 189, 207 (1920) again defined "income" for Sixteenth Amendment purposes as excluding business costs.

For 83 years federal courts have held must be allowance of business costs as subtraction from receipts in computing gross income. See, e.g., *U.S. v. Ballard,* 535 F.2d 400 (8th Cir. 1976); *Poorbaugh v. U.S.,* 423 F.2d 157 (3rd Cir. 1970); *Starrels v. C.I.R.,* 304 F.2d 574 (9th Cir. 1962).

When Congress established filing requirements, it used "gross income" as test, and within 26 U.S.C. §61 set forth expansive definition of "gross income", but with respect to "gross income" derived from business merely said it was "gross income derived from business".[70]

Unless Congress reasoned in a circle, plain meaning of 26 U.S.C. §61(2) is refers to fourteen other types of enumerated gross income "derived" as gain from capital investment, and with respect to 26 U.S.C. §7203 prosecutions that is exactly how §7203 has been applied:

First Circuit: Siravo v. U.S., 377 F.2d 469, 473 (1967). *Fifth Circuit: U.S. v. Fowler,* 605 F.2d 181, 185 (1979). *Seventh Circuit: U.S. v. Thompson,* 23 F.3d 1225, 1230 n.8

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[70] *U.S. v. Burke,* 504 U.S. 229 (1992), reaffirmed "accession to wealth" income definition of §61 found in *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426 (1955) (see App. 15 for § 61).

(1994). *Tenth Circuit: U.S. v. Brewer,* 486 F.2d 507, 509-510 (1973). Even *Ninth Circuit* in accord until Petitioner's unpublished decision: *U.S. v. Gillings,* 568 F.2d 1307, 1310 (1978).

Neither Judge Real nor Petitioner's panel could locate statute defining gross income, 26 U.S.C. §61.

Thus, Judge Real merely added up what was "gross receipts"; panel similarly misunderstood business "gross" (receipts *or* income) not "individual gross income" (which triggers a filing duty) and cited not a single statute or case to support view even if "Dubin's net income fell below $400 for the years in question, it is irrelevant".

2. Section 7203 prosecutions require indictment

26 U.S.C. §7203 subjected Petitioner "in addition to other penalties provided by law" to be "imprisoned not more than one year" per offense. For Counts II and III, one of those *other penalties* pursuant to 18 U.S.C. §3583 was possibility of supervised release revocation imprisonment for up to one additional year.

Rule 7(a) of the Federal Rules of Criminal Procedure recites "an offense which may be punished by imprisonment for a term exceeding one year . . . shall be prosecuted by indictment". The question arises whether addition of supervised release denied District Court subject matter jurisdiction to proceed absent indictment.

There is division among Circuits how to interpret "supervised release" for this and other purposes.

In *U.S. v. Soto-Olivas,* 44 F.3d 788, 790 (1995), Ninth Circuit held supervised release revocation imprisonment "part of the original sentence for the original crime" to avoid double jeopardy challenge; otherwise serious questions would be raised concerning absence of traditional guaranties to trial by jury, defense counsel, presumption of innocence unless disproven beyond reasonable doubt in prosecutions for "violations", some not even statutory crimes. More recently, Ninth Circuit extended that reasoning, *U.S. v. Pierce,* 75 F.3d 173,

177 (1996) (supervised release just like parole). But see *U.S. v. Reese,* 71 F.3d 582 (1995).

Petitioner cited *Soto-Olivas* to panel; it did not even mention it, instead claiming bound by *U.S. v. Linares,* 921 F.2d 841 (1990), *U.S. v. Purvis,* 940 F.2d 1276 (1991). *Purvis* ruled it was bound by *Linares,* but Rule 7(a) never raised; circuit precedent not controlling where argument new, *U.S. v. Vroman,* 975 F.2d 669, 672 (9th Cir. 1992). And *Linares* was itself *dicta* and therefore not controlling either, as it held appellant there had no standing, indicted first.

Ninth Circuit has already determined Congressional intent to make supervised release punishment part of original sentence for original crime. *Stare decisis* should have applied. See *Neal v. U.S.,* 133 U.S. 709 (1996). Moreover, any retrospective interpretation of 18 U.S.C. §3583 in Ninth Circuit would be *ex post facto* law, *Bouie v. Columbia,* 378 U.S. 347 (1964).

A more difficult question arises: Does charging by information in such circumstances violate Indictment Clause?

Although historically this Court defined "infamous crime" as one punishable by imprisonment for more than one year or at hard labor, *Ex parte Wilson,* 114 U.S. 417 (1885), *Mackin v. U.S.,* 117 U.S. 348 (1886), *In re Claasen,* 140 U.S. 200 (1891), *U.S. v. Moreland,* 258 U.S. 433 (1922), those decisions based on fact imprisonment over one year served in penitentiary, 114 U.S. at 428.

First, §7203 violations labeled "misdemeanors", 18 U.S.C. §1(2), only because maximum sentence imposed did not exceed one year, *In re Bonner,* 151 U.S. 242 (1894), *Duke v. U.S.,* 301 U.S. 492 (1937).

Second, Circuits have held §7203 violations not "infamous crimes", but precedents arose *before* 18 U.S.C. §3583; *U.S. v. Driscoll,* 612 F.2d 1155 (9th Cir. 1980); *U.S. v. Russell,* 585 F.2d 368 (8th Cir. 1978); *U.S. v. Kahl,* 583 F.2d 1351 (5th Cir. 1978).

Third, nature of "penitentiaries" has changed in one hundred years, raising troubling questions about protecting so important a constitutional right as the Grand Jury by allowing

it to hang on outmoded nomenclature. See *Hannah v. Larche,* 363 U.S. 420, 489-490 (1960) (Frankfurter, J., concurring in result); *Costello v. United States,* 350 U.S. 359, 362 (1956); *Branzburg v. Hayes,* 408 U.S. 665, 687 (1972); *Wood v. Georgia,* 370 U.S. 375, 390 (1962).[71]

3. Filing duty satisfied by return with zeros

Petitioner has always admitted delayed filing Form 1040s; he contends having filed Form 4868s, extension requests which require tax information, those returns satisfied return requirement.

Ninth Circuit seven years before his 1986 return due decided in *U.S. v. Long,* 618 F.2d 74 (1980), return marked with only zeros satisfied §7203. *U.S. v. Kimball,* 896 F.2d 1218 (9th Cir. 1990), vacated in part, 925 F.2d 356 (9th Cir. 1991), *en banc* reaffirmed *Long.* The legal issue is whether timely Form 4868s satisfy §7203's return requirement.

Citing *U.S. v. Bentson,* 947 F.2d 1353 (9th Cir. 1991), his panel, applying doctrine of judicial admissions, claimed he admitted had not filed returns. A complete review of his testimony shows only two such references: "DUBIN: I told them I hadn't filed. I told them why I hadn't filed [direct]. * * * I always said I had no income. I reported that to them at that time when I asked for the extension [cross]."[72] The first statement referred to Form 1040s. The second statement verifies this, "reported that to them" using Form 4868s.

Panel applied erroneous rule of law. "Judicial admissions" must be unequivocal and relate to facts, not interpretations of law. See 29A Am. Jur. 2d, Evidence §770. It misunderstood *Bentson,* where there was no contention *any* returns filed. Cases cited in *Bentson* relied on unequivocal fact admissions: *U.S. v. Wilmer,* 799 F.2d 495, 502 (9th Cir. 1986) (intoxication); *Magallanes-Damian v. INS,* 783 F.2d 931, 934 (9th Cir. 1987) (illegal entry); *American Title Ins.*

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[71] See Petitioner's confinement conditions, App. 40.

[72] RT 9/14/94, pp. 102, 134, reviewing pp. 96-156.

Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988) (title procedure).

Failure to apply law of Ninth Circuit equally violated Equal Protection encompassed in Fifth Amendment, *Mathews v. de Castro*, 429 U.S. 181 (1976). Any retrospective overruling by Ninth Circuit or this Court would subject Petitioner to *ex post facto law.* See *Neal v. U.S.*, 133 U.S. 709 (1996), *Bouie v. Columbia*, 378 U.S. 347 (1964).

4. Section 7203 is void for vagueness

This Court has often repeated "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). One could hardly imagine a worse example. 26 U.S.C. §7203 fails to identify filing requirements, directing us instead to entire Internal Revenue Code.[73]

Requiring clear penal laws is not only designed to give notice; explicit standards needed to prevent arbitrary law enforcement, 408 U.S. at 108-109, impacting Bill of Rights Guarantees, 408 U.S. at 109.

All three evils are here. Petitioner was found to violate §7203 based on confusing legislative scheme for defining gross income; agency responsible also confused.

Its enforcement gave unacceptable leeway to system officials: Information confused business gross with individual income; prosecutors had one theory for conviction, judge three others; neither identified correctly actual filing statute; at sentencing gross receipts used in applying "gross income" test, very type of system miscues Court has always rejected. See *Smith v. Goguen*, 415 U.S. 566 (1974).

Petitioner at arraignment made important choices, waiving jury and counsel, misunderstanding possible punishment resulting from lack of adequate notice or any Rule 58(b)(2) explanation.

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[73] Section 7203 also makes no mention of supervised release, nor of 18 U.S.C. §3571 which quadrupled the maximum fine.

His reviewing panel found "precluded" by precedent, *U.S. v. Vroman*, 975 F.2d 669, 671-672 (9th Cir. 1991), holding no violation of due process because no reference in §7203 or Indictment to which filing statute violated. But *Vroman* did not involve sole proprietor, nor taxpayer who obeyed IRS, nor was lack of notice to system personnel raised. The panel overlooked vagueness of §7203 *as applied.*

Recently, in *U.S. v. Foley*, 73 F.3d 484 (2nd Cir. 1996), greater fidelity was shown *Grayned*, deciding failure to allege an "implicit element" of offense "explicitly" is Fifth Amendment *jurisdictional* defect.

5. Subjective intent evidence must be weighed

Cheek v. U.S., 498 U.S. 192, 200 (1991), interpreted §7203 to require proof of specific intent, holding reversible error to disregard evidence of subjective good faith misunderstanding of tax laws. In *Cheek*, the filing advice came, not from IRS, but from Cheek's attorney.

Judge Real prejudiced Petitioner's ability to negate willfulness: (1) preventing him from having records, exhibits at trial; (2) rejecting documentary evidence of reliance on IRS forms, printed instructions; (3) rejecting documentary evidence of reliance on IRS advice; (4) discounting his credibility based on secret ex parte prosecutorial hearsay outside trial; (5) trying him *pro se* while ill, unprepared, sedated, sleepless, jailed; (6) refusing to permit him to complete testimony, argument; (7) excluding his cross-examining of witnesses to prove good faith; (8) excluding his cross-examining of witnesses to prove lack of taxes owed; (9) forgetting he was in IRS offices being audited before any returns due and he informed them would not be filing and why; (10) ignoring evidence of his historically delayed filing pattern when reporting no net business income for ten years prior to prosecution; (11) judging specific intent without understanding statutory basis for sole proprietor's duty to file.

Seven of these eleven *Cheek* violations were completely ignored by Petitioner's panel.[74] The panel could only say "apparently" Judge Real weighed reliance on IRS correspondence, ignoring his announced refusal to do so.

Accepting Judge Real's findings attacking Petitioner's credibility as his linchpin for discounting good faith, panel dismissed consideration of effect of prosecutors' ex parte before-trial hearsay.

The panel considered questioning on net income and actual tax liability "irrelevant", forgetting that even if its erroneous filing test were true, under *Cheek* Petitioner still had right to show lack of willfulness by evidence no taxes owed, *Lumetta v. U.S.*, 362 F.2d 644, 645-646 (8th Cir. 1966).[75]

Lastly, panel seized on Petitioner's 1984 Form 1040, filed without delay although claiming loss, as raising inference he knew had duty to file, yet ignored history of his entire filing pattern for over a decade, reporting filing belief to IRS without objection.

Difficulty with "inferential" approach used by panel is it relies on objective inferences of willfulness without evidence of actual intent. For instance, panel points to "impressive credentials" to raise inferences of willfulness, stretching from "complex business litigation" involving mortgage foreclosures and partnership disputes, to Tax Code acumen, as Judge Real did: "To a lawyer, the Order of the [sic] Coif? Please, Mr. Dubin, don't try to do that to me". But there was no evidence of any tax knowledge.[76]

It is unconstitutional to convict on "pyramiding of inferences" to prove specific intent, *Ingram v. U.S.*, 360 U.S. 672,

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[74] There is no mention (App. 3) of Nos. 1, 2, 5, 6, 7, 9, or 11.

[75] Panel's cases inapposite. *U.S. v. Komisaruk*, 885 F.2d 490, 495 (9th Cir. 1989), *U.S. v. Poschwatta*, 829 F.2d 1477, 1483 (9th Cir. 1987), decided before *Cheek*, concerned irrelevant testimony.

[76] The panel again cited inapposite cases: *U.S. v. Claiborne*, 765 F.2d 784 (9th Cir. 1985) (had judged tax code disputes); *U.S. v. Ostendorff*, 371 F.2d 729 (4th Cir. 1966) (had tax accounting knowledge).

680 (1959), quoting *Direct Sales Co. v. U.S.*, 319 U.S. 703, 711 (1943).

6. Counsel cannot be denied as pretrial sanction

Petitioner was denied right to counsel, forced to proceed to trial *pro se*: (1) never warned of dangers of self-representation; (2) never conducted criminal defense; (3) waived counsel at arraignment without told maximum sentence or fine; (4) waived counsel at arraignment after informally given false information about maximum sentence and fine; (5) found by Magistrate three weeks before trial to be ill; (6) found by Magistrate three weeks before trial excusably unprepared; (7) prevented from having files at trial; (8) jailed during trial, unable to assemble witnesses or research; (9) sedated at hospital morning of trial and cognition impaired; (10) forcibly removed from hospital over admitting physician's objections; (11) competency to proceed, represent himself never examined.

Judge Real refused continuances to allow him to retain counsel as pretrial punishment. Petitioner's panel remarkably found nothing out of the ordinary in all this.

In *U.S. v. Goldberg*, 67 F.3d 1092 (3rd Cir. 1995), Judge Cowen undertakes most comprehensive analysis yet of relationship between right to counsel and supposed trial delaying tactics, holding in the absence of *Faretta* warning judge cannot constitutionally punish defendants by finding waiver even in blameworthy circumstances.

Third Circuit found seven of this Court's decisions controlling: *Michigan v. Jackson*, 475 U.S. 625 (1986); *Faretta v. California*, 422 U.S. 806 (1975); *Illinois v. Allen*, 397 U.S. 337 (1970); *Chapman v. California*, 386 U.S. 18 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938); and *Powell v. Alabama*, 287 U.S. 45 (1932) – holding *de novo* review required, burden on prosecution to show waiver, no harmless error in denial-of-counsel cases.

This Court has "repeatedly and consistently" held trial of incompetent criminal defendant violates due process and all

rights "deemed essential to a fair trial", *Cooper v. Oklahoma,* 516 U.S. ___ (1996), yet Petitioner's panel ignored all Supreme Court precedent, even in the absence of any evidentiary hearing.

7. Judge Real was not an impartial trier of fact

Judge Real lacked impartiality, both in manner of self-selection and in weighing of evidence.

First, he handpicked Petitioner's case. Due Process does not permit prejudices and unexplained likes and dislikes of trier of fact to self-select criminal cases.[77]

Petitioner's panel argued he waived objection, agreeing to Judge Real, although even Judge Real made no such finding. Petitioner was unaware obviously of Judge Real's actual reputation, misadvised by Judge Real's clerk.

This Court has long held burden on prosecution to show waiver, that "every reasonable presumption" against waiver of fundamental constitutional rights must be indulged, *Michigan v. Jackson,* 475 U.S. 625, 633 (1986), quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).[78]

Second, Judge Real did not weigh evidence impartially, for he accepted ex parte out-of-court hearsay from prosecutor damaging Petitioner's credibility, to outweigh evidence of good faith, and to enhance sentence.

For more than a century this Court has held evidence developed against defendants must come from "the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel," *Turner v. Louisiana,* 379 U.S. 466, 472-473 (1965); *Parker v. Gladden,* 385 U.S. 363, 364

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[77] Unlike *Tyson v. Trigg,* 50 F.3d 436 (7th Cir. 1995), *cert. denied,* 516 U.S. ___, (1996) (prosecutor picked among grand juries, each assigned to separate judge), Judge Real selected case and was bench trial.

[78] It is Government's burden to show waiver was knowing, intelligent; see *Michigan v. Harvey,* 494 U.S. 344, 353-355 (1990). Petitioner had no opportunity to seek Judge Real's disqualification during trial as did not learn of ex parte contacts for three months.

(1966); *Pointer v. Texas*, 380 U.S. 400 (1965); *In re Oliver*, 333 U.S. 257 (1948); *Kirby v. U.S.*, 174 U.S. 47 (1899).

False evidence from prosecutors, acted upon by trier of fact, is especially distressing, *Giglio v. U.S.*, 405 U.S. 150 (1972); *Miller v. Pate*, 386 U.S. 1 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959).[79]

Petitioner's panel ignored not only prosecutors' *judicial admission* of ex parte hearsay in sentencing and in appellate brief, but controlling Ninth Circuit precedent: *U.S. v. Thompson*, 827 F.2d 1254, 1258 (9th Cir. 1987).

Prejudicial ex parte communications between prosecutor and trial judge are unethical. For attorneys, Canon 7, EC 7-35, Disciplinary Rule 7-100(B) sets the standard. It is judge's ethical duty to ignore it, report it to other side, Canon 3A(4), Code of Judicial Conduct.

The exercise of supervisory powers has always been appropriate means of policing unethical conduct by prosecutors, *Bank of Nova Scotia v. U.S.*, 487 U.S. 250 (1988), *U.S. v. Williams*, 118 L.Ed.2d 352 (1992). Unethical conduct by federal judges is even more alarming, *Wheat v. U.S.*, 486 U.S. 153, 160 (1988); *Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968); *In re Murchison*, 349 U.S. 133, 136 (1955); *Quercia v. U.S.*, 289 U.S. 466 (1933).

8. No sweeping due deference for fictitious findings

In reviewing findings, panel applied an erroneous rule of law, a purely clear error, substantial evidence standard.

First, Judge Real's findings were "adopted". "Adopted" findings have always been subjected to greater scrutiny, *U.S. v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 & n.4 (1964). See *Photo Electronics Corp. v. England*, 581 F.2d 772, 776-777 (9th Cir. 1978).

Second, had panel scrutinized findings, it would have found findings: (1) *inadequate*, willfulness findings drawing

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[79] Prosecutors also admitted knew Petitioner represented by counsel when ex parte contact made, Ans. Brief, at 22-23, 24-25 (Mr. Cassiday).

objective inferences from irrelevant, incomplete data; (2) *erroneous*, income findings based on nothing in trial record, and hospital findings contradicted; (3) *premature*, sentencing findings weakened by having refused, cut-off relevant testimony; and (4) *prejudgments*, credibility findings made before either Petitioner or Dr. deVegvar in his presence, attempting to insulate unsubstantiated findings by calling them credibility determinations.

Third, many involved questions of constitutional law, and mixed questions of law and fact, requiring *de novo* review. See *Ornelas v. U.S.*, No. 95-5257, May 28, 1996 (USSC).

9. Parties may enforce Good Behavior Clause

This Court's traditional dislike for engaging in factual inquiries would be misplaced if applied to this Petition, for such documented factual difficulties here raise one of the most perplexing concerns historically troubling this Court, which no set of Justices has yet forthrightly addressed: How should federal courts review trial findings made or upheld by judges with competency disabilities?[80]

It is far from secret Judge Real's officiating has been an embarrassment for three decades, despite his notorious reputation for manufacturing findings to fit preconceptions.

Moreover, to Petitioner's double misfortune, Ninth Circuit procedures apparently encouraged an initial snap-judgment his appeal was the usual failure-to-file waste of time, and weighted case accordingly, assigning as the opinion writer an appellate judge with a distinguished career, but nevertheless one himself under mounting grievances for advancing age, who not coincidentally was coaxed into senior

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[80] Parties are prohibited from using judicial grievance procedures, *In re Charge of Judicial Misconduct*, 593 F.2d 879 (9th Cir. 1979); *id.*, 613 F.2d 768 (9th Cir. 1980). This Court has twice ducked disciplining federal judges, *Chandler v. Judicial Council*, 382 U.S. 1003 (1966); *id.*, 398 U.S. 74 (1970). Meanwhile, disciplinary power of Chief Judges and Judicial Council remains undecided, a mystery for most, 28 U.S.C. §§137, 332.

status at same time Petitioner's Memorandum became one of his last active tasks.

At the center of this case is the Good Behavior Clause of Article III, §1, of the Constitution.

Although having at common law a recognized meaning and procedure, *U.S. v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir. 1974), and unlike the established impeachment provisions ("Bad Behavior" Clause) of Article II, §4, there are no formal procedures to retire federal judges with disabilities while their cases suffer.

It is instructive what happened to this Petitioner, asserting standing to enforce that constitutional provision.

First, Petitioner wrote in his Opening Brief: "Judge Real literally filed *perjured* Findings of Fact to bury this Appeal in an absolutely false record. . . . Judge Real and Article III of the U.S. Constitution are the real issues in this Appeal."[81] These words apparently did not find favor with Judge Poole, himself under fire due to age infirmities. After discovering recently from docket sheet Judge Poole authored Memorandum and being nudged into retirement, Petitioner filed two motions to dismiss for lack of subject matter jurisdiction and prosecutorial misconduct, filed before rehearing petition denied, to secure attention of other members, but was notified mandate issued and "consequently" two motions "denied".

Since premature issuance of mandate no reason for "denying" motions, and Court of Appeals thereafter had no jurisdiction to deny motions, Petitioner filed motion to recall mandate and motions to reconsider *en banc* both denials, which three motions were filed on April 5, 1996; but after Petitioner then submitted an affidavit of disqualification under Good Behavior Clause, April 15, 1996,[82] against panel members based on having been influenced by disqualified jurist, entire panel voted to rescind original filing of motion to recall mandate, and other two motions, curiously reasoning because mandate already issued, ordered no further matters be

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[81] O. Brief, at 35. See Apps. 19, 20 (Title 28).

[82] App. 30. Original affidavit returned, its entry stricken.

filed in "closed" appeal, ignoring entirely motion to recall mandate and issuance of a prior mandate very reason such motions filed, and ignoring automatic disqualifying effect of affidavit of disqualification under 28 U.S.C. §455.

That is how the appellate door was slammed shut when Petitioner sought to raise questions of competency.

V. CONCLUSION

There is finally yet another unusually disturbing feature of Petitioner's case. He is an attorney with a controversial, high profile civil trial practice, often locking litigation horns with local assistant U.S. attorneys, most recently in extensive suits brought for clients against past Government officials, including one former Treasury Secretary, coincidentally overseeing the IRS.

Such suits as this, brought by Information, unable to secure grand jury indictment, against a professional adversary, steered with a prior Government-secured continuance to be heard before one of the prosecution's favorite judges, visiting in Hawaii, and then peppered with false press releases, invites this Court's special attention, the kind of prosecution, for its localized in-system character, which one veteran criminal defense attorney recently called "frightening".[83]

Even more frightening would be this Court's denial of review, for this is not only Petitioner's last available plea for Justice. The National implications of this case are equally alarming.

This prosecution began as a premeditated attempt, now successful, to ruin a productive human life, as a media event, through unprincipled invocation of the criminal sanction, as a planned meretricious tax enforcement scare – trashing in the process bedrock Bill of Rights Guarantees, despite a panoply of civil remedies for any real, not supposed, tax code violations.

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[83] See 59 Criminal Law Reporter 1045 (4/10/96).

There have been many such *targeted* taxing abuses throughout world history. Some have directly led to the penning of revered counterstatements in support of individual liberty – the Magna Carta, for example, and our own Declaration of Independence.

This Court, in this case, should craft an Opinion similarly emphatic in its denunciation of what occurred here, one that is worthy of those Charters and this Nation's love of liberty.

The fact that the federal judiciary, more and more subservient it seems to ruthless law enforcement, has thus far failed this Petitioner is no reason moreover to sacrifice Petitioner in this case on any misconceived altar of judicial self-protection either, for as Justice Black once warned, shielding judges from criticism does not breed judicial respect, but resentment, suspicion, and contempt.[84]

If this Court will not now reverse, who will stop such abuses in the future by this ever-expanding Federal Government of Men and not Laws?

Those who know the system know what happened to this Petitioner is no isolated case, but the outgrowth of a decade of unchecked, accelerated, low-visibility federal prosecutorial power. Where will it all end? Who is safe?

Lompoc FCI
California

August 12, 1996

Respectfully submitted,

GARY VICTOR DUBIN
Member, Supreme Court Bar
Petitioner

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[84] *Bridges v. California*, 314 U.S. 252, 270-271 (1941).

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APPENDIX 1

FINDINGS OF FACT (USDC 1/20/95)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. GARY VICTOR DUBIN, Defendant.	CASE NO. CR 93-1434-MLR FINDINGS OF FACT (Filed Jan. 20, 1995)

1. Defendant GARY VICTOR DUBIN (DUBIN) was charged in an information filed August 13, 1993 for violations of 26 U.S.C. Section 7203 having failed to file his required Federal Income Tax Returns for the calendar years 1986, 1987 and 1988.

2. DUBIN was arraigned on August 27, 1993. He waived trial by jury in spite of the Magistrate judge's advice to the contrary and insisted on his decision to represent himself pro se.

3. After several continuances where DUBIN claimed he was too ill to proceed because of back problems, trial was finally set to begin on September 13, 1994 at 9:00 A.M.

4. On September 9, 1994 he again moved for continuance claiming for the first time he now wanted to be represented by counsel and that he was not prepared to proceed. Nor was his proposed counsel ready to proceed. The motion was denied. After denial of the motion on that same day DUBIN consulted a psychiatrist Dr. Marie-Louise deVegvar complaining of depression as the result of the death of his son some two years before. This was the first time he had ever sought consultation for any mental condition.

5. On the evening of September 12, 1994 DUBIN committed himself to Queen's Medical Center complaining of back problems.

6. On the morning of September 13, 1994 the date set for commencement of trial, DUBIN failed to appear. The Court was advised that because of medical problems to his back DUBIN could not appear at trial. The Court ordered that DUBIN be examined at the hospital by a government doctor. Before this could be accomplished, the duty doctor at the hospital said DUBIN was being discharged because he had no physical disorder. The Court found that DUBIN was physically and mentally fit to participate in a non-jury trial and issued a bench warrant for his arrest.

7. The Court was further advised that DUBIN, immediately upon his discharge, had committed himself to the psychiatric side of Queen's Hospital because he was depressed about the trial and the death of his son.

8. His son had died over two years before. In the interim, from his son's death to September 12, 1994, DUBIN had engaged continuously in the practice of law and had received substantial fees for his legal work.

9. DUBIN had never seen a psychiatrist or been treated by any physician for his alleged depression until September 9, 1994. At that time the psychiatrist Dr. deVegvar did not feel he needed any hospitalization for his alleged depression.

THE TRIAL

10. On September 13, 1994 DUBIN was brought before the Court. Again DUBIN claimed he now wished to be represented by counsel and wanted a continuance for the purpose of letting his counsel prepare. The Court said counsel could participate but that no continuance would be granted. Counsel BENJAMIN CASSIDAY advised the Court that although he had been consulted by DUBIN for the first time on September 9, 1994 he would not proceed as DUBIN'S counsel. Dr. deVegvar's letter dated September 9, 1994 was first presented to the Court after DUBIN had been brought to Court and trial commenced.

11. DUBIN complained that he did not have his records. Those were brought to him during the morning of September 13, 1994 by a friend, also a lawyer, and those records were available to DUBIN throughout the trial. During the trial DUBIN often referred to his records and what they contained.

12. Based on DUBIN'S demeanor and his lucidity, facility and intelligence in responding to the Court's inquiry prior to commencement of the proceedings, the Court found DUBIN mentally competent and physically fit to proceed to trial. The Court further finds that at all times throughout the trial, DUBIN was both mentally competent and physically fit to put on his defense. Moreover, the Court does not find credible the somewhat confusing and conclusory statements regarding DUBIN'S ability to perform at trial contained in Dr. deVegvar's September 9, 1994 letter especially in light of the fact that these unsupported conclusions were made after a single meeting. That single meeting did not result in DUBIN'S commitment to any hospital.

13. On September 13, 1994 at the hearing on Dubin's motion for a new trial, Dr. deVegvar testified that Dubin called Dr. deVegvar the evening of September 12, 1994. Despite the absence of any new facts, Dr. deVegvar wrote a second letter dated December 22, 1994 and received by the Court only in connection with the motion for new trial filed by DUBIN. In light of all the circumstances surrounding DUBIN'S consultation with Dr. deVegvar and the testimony of Dr. deVegvar, the letters of September 9, 1994 and December 22, 1994 are not credible.

14. DUBIN'S failure to file a tax return for the years 1986, 1987 and 1988 was discovered by a Revenue Agent from the Examination Division of the Internal Revenue Service during the audit of his filed 1984 U.S. Individual Income Tax Return Form 1040. The audit of this 1984 return was initially opened in May 1988 and was not completed until March 1990.

15. During the period May 1988 to March 1990 DUBIN failed to meet commitments to provide requested information on more than 30 occasions. DUBIN claimed the urgency of

higher priority items relating to his law practice prevented him from complying with the Revenue Agent's request for information.

16. After March 1990 the Revenue Agent expanded her examination to include an audit of DUBIN'S records to include the unfiled returns for 1985, 1986 and 1987.

17. DUBIN claimed that the 1985, 1986 and 1987 returns had not been filed because he had not had taxable income in excess of $400 from his solely owned legal practice.

18. During each of the years 1985, 1986, 1987, and 1988 DUBIN was withdrawing from his bank accounts in the law practice sums in excess of the filing requirement to pay his non-deductible personal expenses, his son's college expenses, and the expenses necessary to the maintenance of his investments, real estate, and personal property.

19. DUBIN'S testimony that he had "huge losses" to offset his gross income was not credible. DUBIN never made any analysis of his records in any of the years 1985, 1986, 1987 or 1988. Nor did he present any corroborating evidence of these alleged losses.

20. On at least 10 occasions between May 1990 and March 1991, DUBIN failed to provide requested documentation of his expenses during 1985, 1986 and 1987. Only a partially completed schedule for 1985 expenses was finally filed on March 7, 1991.

21. During his trial DUBIN lucidly and thoroughly cross-examined the Revenue Agent Janet Nakasone concerning her audit of his 1985 return and his 1986, 1987 and 1988 income.

22. DUBIN had gross business income of $533,725.39 in 1986, $633,594.38 in 1987 and $330,297.68 in 1988. After applying business deductions of $323,240.43 and non-business deductions of $10,504.67 for 1986; business deductions of $334,963.20 and non-business deductions of $13,843.43; and business deductions of $282,159.97 and non-business deductions of $14,161.17, DUBIN had $199,980.29 taxable income for 1986, $284,787.75 taxable income for 1987 and

$33,976.54 taxable income for 1988 each requiring him to file tax returns for those respective years. Every doubt in these various determinations of taxable income were resolved in favor of DUBIN.

23. DUBIN was obviously aware of the requirement to file income tax returns. This was established by his having filed 1040's in 1984 and in other years that he had no income and by his expressed knowledge of the $400 net income requirement on sole proprietorships. His claimed subjective belief that he was not required to file a return is not credible in light of the evidence addressed at trial, particularly, but not limited to, the evidence concerning the vast amounts of money that had been deposited to his principal accounts and his conduct during the audit process.

24. DUBIN is a sophisticated attorney with a practice largely dedicated to complicated business litigation.

25. DUBIN knowingly and willfully failed to file his required tax returns for the years 1986, 1987 and 1988.

SENTENCING

26. DUBIN was convicted by verdict of the Court on September 14, 1994.

27. Sentencing was set for January 9, 1995.

28. DUBIN was represented by counsel BENJAMIN CASSIDAY at the sentence hearing.

29. DUBIN was allowed allocution [sic] to present mitigation and to make any objections he had to the presentence report.

30. DUBIN'S allucation [sic] was largely one of retrying the case and maintaining his complete innocence to the charges upon which he was convicted.

31. DUBIN presented nothing that could be termed an acceptance of responsibility within the Sentencing Guideline Section 3E1.1.

32. Count One charged a crime not subject to the Sentencing Guidelines, since the violation occurred on August 15, 1987.

33. Counts Two and Three are subject to the Sentencing Guidelines.

34. DUBIN obstructed justice by his failure to appear at the time set for trial and requiring the court to issue an arrest warrant to provide his presence at trial. Defendant was neither mentally nor physically ill on September 12, 1994 or September 13, 1994 so as to prevent him for appearing at trial.

35. The violations charged in Count One, Two and Three are a continuing pattern of conduct permitting a single computation for the tax loss to be used pursuant to the Sentencing Guidelines Section 1B1.3(a)(2) on Counts Two and Three.

36. Financial statements prepared by DUBIN during 1986, 1987 and 1988 showed increases that corresponded to net income much in excess of the filing requirements of each year 1986, 1987 and 1988.

37. In 1986, 1987 and 1988 DUBIN filed reports of what are denominated gross receipts with the State of Hawaii that correspond to the governments gross income figures proved at trial.

38. The Guideline range for Counts 2 and 3 based a total offense level of 14 [sic] and criminal history points of 0 is fifteen (15) [sic] to twenty-one (21) [sic] months.

39. On Count 1 the Court chooses to exclude the 1986 tax loss from the guideline sentencing on Counts 2 and 3 and pursuant to Sentencing Guideline 2T1.2(a)(2). The tax loss therefore on Counts 2 and 3 is for 1987, $643,032 - $20,000 x 10% = $62,303, and for 1988 $469,490 - $20,000 x 10% = $44,949, for a total loss of $107,252. The tax loss figures used here were proved at trial. The method of calculation was not disputed at sentencing.

CONCLUSION

40. DUBIN is guilty of failing to file his required tax returns for the years 1986, 1987, and 1988.

41. On Count One DUBIN is committed to the custody of the Bureau of Prisons for a period of 12 months.

42. On Count Two DUBIN is committed to the custody of the Bureau of Prisons for a period of 12 months.

43. On Count Three DUBIN is committed to the custody of the Bureau of Prisons for a period of 6 months.

44. On Count One DUBIN is fined $25,000.

45. On Count Two DUBIN is fined $100,000.

46. On Count Three DUBIN is fined $100,000. The fines on Counts Two and Three only to run concurrently.

47. The custody sentences on Counts One, Two and Three shall run consecutive to each other.

48. Total custody sentence is 30 months.

49. The fines on Counts Two and Three shall be consecutive to Count One but concurrent with each other only for a total fine of $125,000.

50. DUBIN shall pay the costs of prosecution in the sum of $6,685.70.

51. The fines and costs of prosecution together with the penalty assessment of $75.00 shall be deducted from the cash bond presently on file with the clerk and paid to the United States forthwith.

52. Defendant is placed on one year supervised release on each of Counts Two and Three to run concurrently on the following terms and conditions:

1. He obey all laws local, state and Federal.

2. He provide the Probation Office access to any requested financial information.

3. He cooperate with the Internal Revenue Service in the filing of all past due tax returns and payment of all taxes owing.

53. DUBIN shall report directly to the institution designated for his imprisonment or in default thereof to the office of the United States Marshal at Honolulu, Hawaii by 12 Noon of January 30, 1995. The balance of the bond shall be exonerated upon surrender.

DATED: January 20, 1995.

MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

APPENDIX 2

JUDGMENT IN A CRIMINAL CASE (USDC 1/20/95)

UNITED STATES DISTRICT COURT

District of Hawaii

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
V.	(For Offenses committed on or after November 1, 1987)
GARY VICTOR DUBIN	**Criminal Number: CR 93-01434 MLR 01**
	(Filed Jan. 20, 1995)

THE DEFENDANT:

[X] Was found guilty on count(s) 1, 2 and 3 of the information after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
26:7203	Willful Failure to File	8/15/87	1
26:7203	Willful Failure to File	8/15/88	2
26:7203	Willful Failure to File	4/15/89	3

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] It is ordered that the defendant shall pay a special assessment of $75.00, for count(s) 1, 2 and 3 of the indictment, which shall be due [X] immediately, [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 553-48-0554

Defendant's Date of Birth: 8/27/38

Defendant's Mailing Address:
46-603 Haiku Plantations Drive
Kaneohe, HI 96744

Defendant's Residence Address:
46-603 Haiku Plantations Drive
Kaneohe, HI 96744

January 13, 1995 and January 20, 1995
Date of Imposition of Sentence

/s/ Real
Signature of Judicial Officer

MANUEL L. REAL, Chief, U.S. District Judge
Name & Title of Judicial Officer

JAN 20 1995
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY (30) MONTHS.

This term consists of terms of TWELVE MONTHS on each of Counts 1 and 2 and terms of SIX MONTHS on Count 3, all to served consecutively to the extent necessary to produce a total term of THIRTY MONTHS.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[X] before 12 noon on January 30, 1995.

* * *

SUPERVISED RELEASE

Upon **release** from imprisonment, the defendant shall be on supervised **release** for a term of ONE YEAR
This term consists of terms of ONE YEAR as to each of Counts 2 and 3, all such terms shall be served concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The Defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

1. That the defendant provide the probation office access to any requested financial information;

2. That the defendant cooperate with the Internal Revenue Service in the filing of all past due tax returns and payment to all taxes owing.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $125,000 and the cost of prosecution of $ $6,685.71. The fine includes any costs of incarceration and/or supervision.

[X] This amount is the total of the fines imposed on individual counts, as follows:

On Count 1, a fine of $25,000.

On Counts 2 and 3, a fine of $100,000 to run concurrently.

Ordered that all fines and assessments be deducted by the Clerk of the Court from the cash bail posted by the defendant before the bail mney [sic] is returned to the defendant.

* * *

This fine and the cost of prosecution and the special plus any interest required shall be paid:

[X] in full immediately.

* * *

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

* * *

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See transcript

Guideline Range Determined by the Court: As to Counts 2 & 3

Total Offense Level: 13

Criminal History Category: I

Imprisonment Range: 12 to 18 months

Supervised Release Range: __ to 1 years

Fine Range: $107,252.16 to $200,000 plus costs of prosecution of $6,685.71

* * *

Restitution: $ n/a

* * *

[X] The Sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

* * *

APPENDIX 3

UNPUBLISHED MEMORANDUM (9TH CIR. 12/22/95)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	) No. 95-10040
v.	) D.C. No. CR-93-01434-MLR
GARY VICTOR DUBIN, Defendant-Appellant.	) MEMORANDUM*
	) (Filed Dec. 22, 1995)

Appeal from the United States District Court
for the District of Hawaii
Manuel L. Real, Chief Judge, Presiding

Submitted August 17, 1995**
San Francisco, California

Before: FLETCHER, POOLE, and O'SCANNLAIN, Circuit Judges.

Gary Victor Dubin, an attorney representing himself, appeals his convictions and 30-month sentence, following a bench trial, for three counts of willful failure to file tax returns in violation of 26 U.S.C. § 7203. Dubin argues, among other things, that insufficient evidence supported his convictions because the government failed to prove the elements of § 7203 for the offenses. We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

[p. 2] I

In reviewing sufficiency of evidence, "we consider the evidence in the light most favorable to the government to determine if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *United States v. Hanson,* 2 F.3d 942, 945 (9th Cir. 1993). We will not set aside the district court's factual findings unless clearly erroneous. *United States v. Marchini,* 797 F.2d 759, 766 (9th Cir. 1986), *cert. denied,* 479 U.S. 1085 (1987).

To sustain a conviction of § 7203, the government must show that (1) the taxpayer was required to file a return, (2) he failed to file a tax return, and (3) his failure to file was willful. *United States v. Brodie,* 858 F.2d 492, 497 (9th Cir. 1988). " 'Willfulness' in the context of criminal tax cases is defined as a 'voluntary, intentional violation of a known legal duty.' " *United States v. Powell,* 955 F.2d 1206, 1210 (9th Cir. 1992) (quoting *Cheek v. United States* 498 U.S. 192, 196 (1991)). "[T]he government may prove willful conduct by establishing either: (1) that the defendant acted with a bad purpose or evil motive, *or* (2) that the defendant voluntarily, intentionally violated a known legal duty." *Id.* at 1211. "Willfulness may be inferred from all the facts and circumstances of a defendant's conduct." *Marchini,* 797 F.2d at 766; *accord United States v. Gardner,* 611 F.2d 770, 776 (9th Cir. 1980) (willfulness may be inferred from evidence of consistent pattern of failing to report large amounts of income).

[p. 3] A. Requirement to File

Here, Dubin was a solo law practitioner during the tax years 1986, 1987, and 1988. At trial, the government adduced the following evidence: Dubin had a gross income from his law practice of $553,725.39 in 1986, $633,594.38 in 1987, and $330,297.68 in 1988. He filed for extensions of time to file tax returns for both 1986 and 1987; however, he never filed the returns. He also filed no tax return for 1988. Dubin had previously filed tax returns in 1982, 1983, and 1984.

Relying primarily on the filing instructions for Internal Revenue Service (IRS) form 1040, Dubin testified that,

despite his gross income, he did not file the tax returns because huge business losses or deductions or both resulted in self-employment "net earnings" below $400 for each year in question. *See* 26 U.S.C. § 6017 ("Every individual . . . having net earnings from self-employment of $400 or more for the taxable year shall make a return with respect to the self-employment tax. . . . "). On appeal, Dubin continues to argue vigorously that the statutory filing requirement is solely triggered by "net income," rather than "gross income." We disagree.

Form 1040 list the income level and filing status which trigger the statutory filing requirement for each year. Although self-employed individuals with a net income below $400 are not required to file a tax return, single individuals with an income of at least $3,560 in 1986, $4,440 in 1987, and $4,950 in 1988 were required to file a return. Even assuming, for the sake of argument, that Dubin's net income fell below $400 for the years in [p. 4] question, it is irrelevant based upon his filing status and annual six-figure income. Therefore, the government proved that Dubin was required to file tax returns for the years in question.

B. Failure to File a Return

Dubin argues that the government failed to offer sufficient evidence that he "did not nevertheless timely file with the IRS for 1986, 1987, or 1988." We reject this argument because Dubin testified at trial that he did not file tax returns for the years in question. *See United States v. Bentson,* 947 F.2d 1353, 1354 (9th Cir. 1991) (judicial admissions before district court that defendant failed to file tax returns for years at issue binding on appellate court), *cert. denied,* 504 U.S. 958 (1992).

C. Willfulness

Dubin contends that "the [g]overnment failed to prove that . . . [he] acted willfully if in fact he failed to satisfy any filing and return requirements actually imposed by law." We disagree.

The government introduced evidence that Dubin had filed tax returns in the past and had filed for extensions of time to file. This evidence demonstrates knowledge of a legal duty to file returns, and, thus, goes toward willfulness. *See United States v. Poschwatta,* 829 F.2d 1477, 1481 (9th Cir. 1987), *cert. denied,* 484 U.S. 1064 (1988); *United States v. Callery,* 774 F.2d 1456, 1458 (9th Cir. 1985). Further, Dubin filed a tax return for the 1984 tax year despite indicating a net loss. This evidence [p. 5] directly contradicted Dubin's asserted belief that he was not required to file a return unless his net income exceeded $400. *See United States v. Kellogg,* 955 F.2d 1244, 1248 (9th Cir. 1992); *Marchini,* 797 F.2d at 766. Dubin's distinguished academic achievements, impressive professional credentials, and his lucrative law practice primarily devoted to complicated business litigation also support an inference that he willfully failed to file tax returns. *See, e.g., United States v. Claiborne,* 765 F.2d 784, 798-99 (9th Cir. 1985) (district judge's legal background and experience pertinent on willfulness determination in criminal tax evasion), *cert. denied,* 475 U.S. 1120 (1986); *United States v. Ostendorff,* 371 F.2d 729, 731 (4th Cir. 1966) (college graduate's special knowledge of accounting and insurance, and highly profitable business enterprise, among other things, provided inference that defendant willfully failed to file tax returns), *cert. denied,* 386 U.S. 982 (1967).

The record, however, does include evidence that the IRS, in response to letters from Dubin stating that his net income fell below $400 for the years in question, sent him notices indicating that he was not required to file tax returns. The district court apparently weighed this evidence, and Dubin's contention that he relied on the IRS notices against the government's evidence.

In weighing the evidence, a rational trier of fact could conclude that Dubin was aware of his legal obligation to file tax returns, and that this failure to file did not result from a [p. 6] good-faith reliance on the IRS notices. *See Poschwatta,* 829 F.2d at 1481; *United States v. Buras,* 633 F.2d 1356, 1359 (9th Cir. 1980).

II

Dubin's contentions regarding the alleged violation of his Fifth and Sixth Amendment rights, and claimed sentencing errors warrant little discussion.

At the eleventh hour, Dubin sought to receive a further postponement of the trial because he claimed he was so depressed from his son's death two years earlier, that he was unable to prepare for trial. The district court denied the continuance. The court discounted the psychiatrist's report that opined that Dubin was depressed and consequently could not prepare for trial in light of other evidence: Dubin's son had died two years previously; Dubin had, in the meantime, continued to carry on a vigorous and successful law practice and sought psychiatric care for the first time only a week before the trial date. In addition, Dubin's demeanor and behavior appeared entirely normal. Also, the court noted Dubin was granted numerous previous continuances. We cannot say that the court abused its discretion by not granting a continuance or holding a competency hearing. *See, e.g., Moran v. Godinez,* 40 F.3d 1567, 1571-72 (9th Cir.), *amended on other grounds,* 57 F.3d 690 (1994) (order); *Harding v. Lewis,* 834 F.2d 853, 857 (9th Cir. 1987), *cert. denied,* 488 U.S. 871 (1988).

[p. 7] Dubin's generalized assertions that the court's repeated interruptions of his arguments and cross-examination of government witnesses deprived him of a fair trial are insufficient to establish abuse of discretion. Dubin's argument that, because the information only cites § 7203 (penalty provision), rather than a filing requirement provision, he did not have sufficient notice of the charges against him is foreclosed by *United States v. Vroman,* 975 F.2d 669, 671-72 (9th Cir. 1992). We reject Dubin's claim that he should have been charged by indictment in order "to convict [him] of a misdemeanor punishable by imprisonment up to one year and one year additionally of supervised release." *See United States v. Purvis,* 940 F.2d 1276, 1279-80 (9th Cir. 1991) ("[A] person convicted of a misdemeanor who faces an authorized punishment of one year of incarceration plus one year of supervised

release is not subject to a term of imprisonment of more than one year for purposes of the Indictment Clause."); *United States v. Linares,* 921 F.2d 841, 844 (9th Cir. 1990) (same). To the extent Dubin urges this panel to reconsider *Purvis* and *Linares,* we note that a three-judge panel lacks the authority to disregard or overrule Ninth Circuit precedent. *See United States v. Lockett,* 919 F.2d 585, 591 (9th Cir. 1990). It is unclear whether he also is asserting that the thirty-month sentence required that he be charged by indictment rather than information. If so, the argument is unavailing. Because each offense with which Dubin was charged is not punishable by a sentence of imprisonment in excess of one year, he did not [p. 8] have a right to be prosecuted by indictment rather than information. *See* U.S. Const. Amend. V; Fed. R. Crim. P. 7(a). That Dubin received consecutive sentences of one year on the first count, one year on the second count, and six months on the third count does not convert the offenses into "infamous" crimes for which an indictment is required. *See United States v. Jordan,* 508 F.2d 750, 753 (7th Cir.), *cert. denied,* 423 U.S. 842 (1975) (proper to charge in an information four misdemeanor counts of failure to file tax returns and impose consecutive sentences totalling fifteen months imprisonment).

To the extent Dubin contends he was improperly induced to waive counsel, jury trial, and assignment of Judge Real as the trial judge, we conclude that such contentions are amply belied by the record.

The district court did not abuse its discretion by prohibiting Dubin's cross-examination of witnesses on his erroneous interpretations of the tax laws, and irrelevant evidence concerning his net income. *See United States v. Komisaruk,* 885 F.2d 490, 495 (9th Cir. 1989); *Poschwatta,* 829 F.2d at 1483. Although the magistrate judge failed to comply with all the requirements of Fed. R. Crim. P. 58(b)(2) at the initial appearance, Dubin has failed to show that he suffered any prejudice which would constitute reversible error. *See United States v. Doe,* 743 F.2d 1033 (4th Cir. 1984). The court also did not abuse its discretion by denying Dubin's request for a continuance to obtain the assistance of counsel. The record discloses

that: (1) Dubin had repeatedly insisted on representing himself; (2) Dubin made the [p. 9] request for counsel on the morning of trial; (3) Dubin had been granted prior continuances; (4) new counsel was not prepared to proceed; and (5) the case had been pending for over one and one-half years. The denial of the continuance was not an abuse of discretion. *See United States v. Leavitt,* 608 F.2d 1290, 1293-94 (9th Cir. 1979); *see also United States v. George,* 56 F.3d 1078, 1084 (9th Cir. 1995); *United States v. Kelm,* 827 F.2d 1319, 1322 (9th Cir. 1987).

We reject as frivolous Dubin's unsubstantiated claims of misconduct by either the district judge or the prosecutor. We also reject Dubin's about-face argument challenging the assignment of his case to Judge Real; Dubin specifically agreed in writing to have Judge Real, rather than a magistrate judge, hear his case. He cannot now complain.

We also reject Dubin's contention that the district court erred by failing to hold an evidentiary hearing to resolve each controverted matter in the presentence report as prescribed by Fed. R. Crim. P. 32. Dubin's counsel objected to an upward adjustment for obstruction of justice, and disputed the amount of tax loss. The court rejected defense counsel's arguments. The court also afforded Dubin his right of allocution, which he used to reargue his case, and to reassert his innocence to the charges. Dubin neither made a specific reference to his written objections nor requested a definitive ruling on the 69 objections contained [p. 10] therein. Under such circumstances, no further factual findings were necessary. *See, e.g., United States v. Helmy,* 951 F.2d 988, 998-99 (9th Cir. 1991), *cert. denied,* 504 U.S. 945 (1992); *United States v. Rigby,* 896 F.2d 392, 394 (9th Cir. 1990).

We decline to consider, for the first time on appeal, Dubin's contentions that the district court either misapplied U.S.S.G. § 2F1.1 in computing the offense level or erroneously imposed the corresponding fines. *See United States v. Flores-Payon,* 942 F.2d 556, 558 (9th Cir. 1991); *United States v. Mondello,* 927 F.2d 1463, 1468 (9th Cir. 1991). Based upon the record before us, we cannot say the district court clearly erred by finding that Dubin obstructed justice by

checking himself into a hospital on the eve of trial. See U.S.S.G. § 3C1.1, comment. (n.3(e)); *see, e.g., United States v. Draper,* 996 F.2d 982, 986-87 (9th Cir. 1993); *Mondello,* 927 F.2d at 1466-67. Therefore, the § 3C1.1 enhancement was proper.

Dubin's remaining contentions are utterly meritless and warrant no discussion.

AFFIRMED.

APPENDIX 4

ORDER EXTENDING TIME (9th Cir. 1/11/96)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARY VICTOR DUBIN, Defendant-Appellant.	No. 95-10040 D.C. No. CR-93-01434-MLR ORDER (Filed Jan. 11, 1996)

Before: FLETCHER, POOLE, AND O'SCANNLAIN, Circuit Judges.

Appellant Gary Victor Dubin's January 2, 1996 motion for extension of time until January 19, 1996 to file a petition for rehearing is granted.

APPENDIX 5

ORDER DENYING REHEARING (9th Cir 3/8/96)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARY VICTOR DUBIN, Defendant-Appellant.	No. 95-10040 D.C. No. CR-93-01434-MLR ORDER (Filed Mar. 8, 1996)

Before: FLETCHER, POOLE, and O'SCANNLAIN, Circuit Judges.

Appellant Gary Victor Dubin's petition for rehearing and suggestion for rehearing en banc filed January 19, 1996 is denied.

APPENDIX 6

ORDER ISSUING MANDATE (9th Cir. 3/18/96)

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-10040

CT/AG#: CR-93-1434-MLR

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GARY VICTOR DUBIN

Defendant - Appellant

(Filed 3/18/96)

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause be, and hereby is AFFIRMED.

APPENDIX 7

ORDER DENYING MOTIONS TO DISMISS
(9th Cir. 3/21/96)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARY VICTOR DUBIN, Defendant-Appellant.	No. 95-10040 D.C. No. CR-93-01434-MLR ORDER (Filed Mar. 21, 1996)

Before: FLETCHER, POOLE, and O'SCANNLAIN, Circuit Judges.

Appellant Gary Victor Dubin's emergency motion to stay an inmate transfer is denied.

On March 8, 1996, the panel denied appellant's petition for rehearing and suggestion for rehearing en banc. On March 18, 1996, the mandate issued in this case.

Consequently, all pending motions and requests in this case are denied.

APPENDIX 8

ORDER RESCINDING FILINGS (9th Cir. 4/23/96)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARY VICTOR DUBIN, Defendant-Appellant.	No. 95-10040 D.C. No. CR-93-01434-MLR ORDER (Filed Apr. 23, 1996)

Before: FLETCHER, POOLE, and O'SCANNLAIN, Circuit Judges.

The mandate has issued in this appeal. The Clerk's filing of motions on April 5, 1996 is rescinded. The Clerk shall accept no further matters for filing in this closed appeal.

APPENDIX 9

ARTICLE III, SECTION 1, U.S. CONSTITUTION

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

APPENDIX 10

FIFTH AMENDMENT TO U.S. CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX 11

SIXTH AMENDMENT TO U.S. CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX 12

SIXTEENTH AMENDMENT TO U.S. CONSTITUTION

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

APPENDIX 13

18 U.S.C. § 3571

Sentence of fine

(a) In general. – A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) Fines for individuals. – Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of –

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (d) of this section;

(3) for a felony, not more than $250,000;

(4) for a misdemeanor resulting in death, not more than $250,000;

(5) for a Class A misdemeanor that does not result in death, not more than $100,000;

(6) for a Class B or C misdemeanor that does not result in death, not more than $5,000.

(7) for an infraction, not more than $5,000.

(e) Special rule for lower fine specified in substantive provision. * * * – If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

APPENDIX 14

18 U.S.C. § 3583

Inclusion of a term of supervised release after imprisonment

(a) In general. – The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release. – Except as otherwise provided, the authorized terms of supervised release are –

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release. – The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

* * *

(h) Supervised release following revocation. – When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant

be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

* * *

APPENDIX 15

26 U.S.C. § 61

Gross income defined

(a) General definition. – Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, fringe benefits, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

* * *

APPENDIX 16

26 U.S.C. § 6011

General requirement of return, statement, or list

(a) General rule. – When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary.

* * *

APPENDIX 17

26 U.S.C. § 6012

Persons required to make returns of income

(a) General rule. – Returns with respect to income taxes under subtitle A shall be made by the following:

> **(1)(A)** Every individual having for the taxable year gross income which equals or exceeds the exemption amount, except that a return shall not be required of an individual –
>
> * * *
>
> **(ii)** who is a head of a household (as so defined) and for the taxable year has gross income of less than the sum of the exemption amount plus the basic standard deduction applicable to such an individual,
>
> * * *

APPENDIX 18

26 U.S.C. § 7203

Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.

* * *

APPENDIX 19

28 U.S.C. § 44

* * *

(b) Circuit judges shall hold office during good behavior.

* * *

APPENDIX 20

28 U.S.C. § 134

Tenure and residence of district judges

(a) The district judges shall hold office during good behavior.

* * *

APPENDIX 21

U.S.S.G. § 2T1.2

Willful Failure To File Return, Supply Information, or Pay Tax

(a) Base Offense Level:

(1) 1 level less than the level from §2T4.1 (Tax Table) corresponding to the tax loss; or

(2) 5, if there is no tax loss.

For purposes of this guideline, "tax loss" means the total amount of tax that the taxpayer owed and did not pay, but, in the event of a failure to file in any year, not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded $20,000.

* * *

APPENDIX 22

U.S.S.G. § 2T4.1

Tax Table

	Tax Loss (Apply the Greatest)	Offense Level
(A)	$2,000 or less	6
(B)	More than $2,000	7
(C)	More than $5,000	8
(D)	More than $10,000	9
(E)	More than $20,000	10
(F)	More than $40,000	11
(G)	More than $70,000	12
(H)	More than $120,000	13
(I)	More than $200,000	14
(J)	More than $350,000	15
(K)	More than $500,000	16
(L)	More than $800,000	17
(M)	More than $1,500,000	18
(N)	More than $2,500,000	19
(O)	More than $5,000,000	20
(P)	More than $10,000,000	21
(Q)	More than $20,000,000	22
(R)	More than $40,000,000	23
(S)	More than $80,000,000	24

APPENDIX 23

FRCrP 7

The Indictment and the Information

(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

* * *

APPENDIX 24

FRCrP 58

Procedure for Misdemeanors and Other Petty Offenses

* * *

(2) Initial Appearance. At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of:

(A) the charge, and the maximum possible penalties provided by law, including payment of a special assessment under 18 U.S.C. § 3013, and restitution under 18 U.S.C. § 3663;

(B) the right to retain counsel;

* * *

APPENDIX 25

28 CFR 50.2

Release of information by personnel of the Department of Justice relating to criminal and civil proceedings.

(a) General. (1) The availability to news media of information in criminal and civil cases is a matter which has become increasingly a subject of concern in the administration of justice. The purpose of this statement is to formulate specific guidelines for the release of such information by personnel of the Department of Justice.

* * *

(b) Guidelines to criminal actions. (1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information say reasonably be expected to influence the outcome of a pending or future trial.

(3) Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:

(i) The defendant's name, age, residence, employment, marital status, and similar background information.

(ii) The substance or text of the charge, such as a complaint, indictment, or information.

(iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.

(iv) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance,

pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest.

Disclosures should include only incontrovertible, factual matters, and should not include subjective observations, in addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

* * *

APPENDIX 26

INFORMATION (USDC 8/13/93)

ELLIOT ENOKI
United States Attorney
District of Hawaii

LESLIE E. OSBORNE, JR.
Assistant U.S. Attorney
Room 6100, PJKK Federal Building
300 Ala Moana Blvd., Box 50183
Honolulu, Hawaii 96850
Telephone: 541-2850

Attorneys for Plaintiff
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. GARY VICTOR DUBIN, Defendant.	NO. 93 01434 INFORMATION [26 U.S.C., § 7203 Willful Failure To File] (Filed Aug. 13, 1993)

INFORMATION

The United States Attorney charges:

COUNT 1

That during the calendar year 1986, **GARY VICTOR DUBIN,** who was a resident of Honolulu, Hawaii, had and received gross income of approximately $530,511.00; that by reason of such gross income he was required by law, following the close of the calendar year 1986, and on or before

August 15, 1987, to make an Income Tax Return to the District Director of the Internal Revenue Service for the Internal Revenue District of Hawaii, at Honolulu, in the District of Hawaii, or to the Director, Internal Revenue Service Center, at Fresno, California, or other proper officer of the United States, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well-knowing and believing all of the foregoing, he did willfully fail to make an Income Tax Return to said District Director of the Internal Revenue Service, to said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Title 26 United States Code, § 7203.

COUNT 2

That during the calendar year 1987, **GARY VICTOR DUBIN,** who was a resident of Honolulu, Hawaii, had and received gross income of approximately $634,100.00; that by reason of such gross income he was required by law, following the close of the calendar year 1987, and on or before August 15, 1988, to make an Income Tax Return to the District Director of the Internal Revenue Service for the Internal Revenue District of Hawaii, at Honolulu, in the District of Hawaii, or to the Director, Internal Revenue Service Center, at Fresno, California, or other proper officer of the United States, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well-knowing and believing all of the foregoing, he did willfully fail to make an Income Tax Return to said District Director of the Internal Revenue Service, to said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Title 26 United States Code, § 7203.

COUNT 3

That during the calendar year 1988, **GARY VICTOR DUBIN,** who was a resident of Honolulu, Hawaii, had and received gross income of approximately $479,289.00; that by

reason of such gross income he was required by law, following the close of the calendar year 1988, and on or before April 15, 1989, to make an Income Tax Return to the District Director of the Internal Revenue Service for the Internal Revenue District of Hawaii, at Honolulu, in the District of Hawaii, or to the Director, Internal Revenue Service Center, at Fresno, California, or other proper officer of the United States, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well-knowing and believing all of the foregoing, he did willfully fail to make an Income Tax Return to said District Director of the Internal Revenue Service, to said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Title 26 United States Code, § 7203.

DATED: Aug. 13, 1993, at Honolulu, Hawaii.

/s/ Elliot Enoki
ELLIOT ENOKI
United States Attorney
District of Hawaii

/s/ Leslie E. Osborne, Jr.
LESLIE E. OSBORNE, JR.
Assistant U.S. Attorney
District of Hawaii

APPENDIX 27

MINUTES REASSIGNING CASE (USDC 7/25/94)

MINUTES

CASE NUMBER: CR. No. 93-01434
CASE NAME: U.S.A. Vs. Gary V. Dubin
(Filed July 25, 1994)

JUDGE: Manuel L. Real
DATE: July 25, 1994

COURT ACTION: EO: Non Jury Trial presently set for 08-02-94 is hereby continued to 08-08-94 @10:00 a.m. Before Visiting Judge Manuel L. Real.

cc: All counsel of Record

Leslie L. Sai
Courtroom Deputy Clerk

APPENDIX 28

NEWS RELEASE (USDJ 8/27/93)

U.S. Department of Justice
#93-077
United States Attorney
District of Hawaii

August 27, 1993

NEWS RELEASE

HONOLULU ATTORNEY PLEADS NOT GUILTY TO FAILING TO FILE

Honolulu Attorney Gary Victor Dubin appeared before U.S. District Court Magistrate Barry M. Kurren today to plead not guilty to failing to file his own Federal income tax returns.

U.S. Attorney Elliot Enoki said that a Federal Grand Jury indicated Dubin earlier this month, for failing to file income tax returns for 1986, when his income was $530,511, for 1987, when his income was $634,100, and for 1988, when his income was $479,289.

Dubin faces a maximum penalty of three years in prison and $75,000 in fines. Representing himself at the arraignment today, Dubin waived a trial by jury. His trial is scheduled for January 11, 1994 before Magistrate Judge Kurren. Dubin was released on bail that was set at $10,000 signature bond.

This case was the result of an investigation by the Internal Revenue Service and is being handled by Assistant U.S. Attorney Leslie E. Osborne, Jr.

APPENDIX 29

TRIAL TRANSCRIPT (USDC 9/13/94) (PP. 32-36)

[p. 32] THE COURT: A pen and paper, Mr. Dubin. What we want you to do is write a note authorizing your friend to get your property from the hospital so he has the keys and then he can go get the exhibits which you left at home.

[p. 33] MR. DUBIN: Your Honor, I think I can best do that on the telephone.

THE COURT: No, write a note.

MR. DUBIN: What is the note to say, Your Honor?

THE COURT: That they're to release your property to your friend.

MR. DUBIN: Oh, the hospital.

THE COURT: To a Mr. Sweeney.

MR. DUBIN: This is a note to the hospital?

THE COURT: Yes, uh-huh. (Pause – defendant writing note)

MR. OSBORNE: Your Honor, might the marshal take a look at the note to see if that comports with his understanding of –

THE COURT: Yes, uh-huh. Surely.

MR. DUBIN: Your Honor, can I say on the record that my ability to prepare at all at the trial of this matter would enable me to have access to my records, familiarity with my office files, and use of Lexis and Westlaw, hardly the kind of thing that I would have at a jail lockup.

THE COURT: No, it's a little late for that, Mr. Dubin. You've had quite a long time to be able to prepare for this trial.

MR. DUBIN: Your Honor, I don't feel I've ever had [p. 34] the opportunity to explain what I did.

THE COURT: Well, that's your own feeling. The evidence is to the contrary.

MR. DUBIN: Well, then the Court should make no pretense about putting the documents in front of me then, because there's nothing I can do in this short notice.

THE COURT: No, you had the documents at home and we will get the documents that you have at home and any notes that you might have on them, and they will be delivered to the detention center so that you can do whatever you want with those documents.

MR. DUBIN: I have a great deal of materials there, no one could that easily find them.

MR. DUBIN: Well, you can tell your friend exactly where they are and what materials you need and he'll bring them to you.

MR. DUBIN: Your Honor, for the short time that's left I don't know how effective that would be anyway.

MR. DUBIN: Well, we'll give you time. Is that note okay?

MR. OSBORNE: Your Honor, the marshal suggests that the gentleman who was just at –

THE COURT: Yes.

MR. OSBORNE: – the lectern, that his name be added to the note as well.

[p. 35] THE COURT: Yes, would you tell them who it is that's going to be able to pick that up, Mr. Dubin? So put his name on the note.

MR. DUBIN: Well, there's this color pen. I don't have that, I'll use another one. (Pause – defendant writing note)

THE COURT: All right, sir, would you do that? Would you get that note and get those materials for Mr. Dubin? If you have to consult with him as to where they are you may do so right now so we can get this done.

MR. DUBIN: Your Honor, it would be necessary for Mr. Clement to call me up from my office – from my home and I could show – point him in the direction –

THE COURT: No, you just tell him where they are. I think he's probably familiar with your home. (Pause)

MR. DUBIN: I urge the Court to consider the fact I wasn't running away from anything.

THE COURT: Yes, just from trial, sir. Okay.

MR. OSBORNE: I hate to complicate this, Judge, but I'm familiar with the area in which Mr. Dubin resides, and the marshal has just reminded me that a note from Mr. Dubin to the gate guard might also assist this gentleman in going through to the property, so perhaps we also need a second note to Haiku Plantation suggesting that –

[p. 36] THE COURT: Yes, you might do that so that he won't have any problems getting –

MR. DUBIN: Your Honor, that's not required.

THE COURT: – into the plantation.

MR. DUBIN: That's not required. All they do is you say who –

THE COURT: All right, Mr. Clements, then if you will stop by the second floor to the clerk's office, get a copy made, and bring back a copy if you have to leave the original, or bring back the original –

THE CLERK: I can get one done for him right now.

THE COURT: All right. Clerk will do that for you.

* * *

APPENDIX 30

AFFIDAVIT OF DISQUALIFICATION (9TH CIR. 9/15/96)

ORIGINAL

GARY VICTOR DUBIN
No. 84958-022
3600 Guard Road
Lompoc, CA 93436
(805) 736-4154
Appellant Pro Se

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellees, vs. GARY VICTOR DUBIN, Defendant-Appellant.	No. 95-10040 AFFIDAVIT OF DISQUALIFICATION OF CIRCUIT JUDGES POOLE, FLETCHER, AND O'SCANNLAIN (Received - Stamped Mar. 15, 1996 [sic 4/15/96])

COME NOW Appellant GARY VICTOR DUBIN, appearing *pro se,* and hereby submits the following sworn affidavit in the form of a Declaration, and thereby hereby DECLARES as follows:

1. I am the Appellant in this Appeal; last week I submitted five motions to this Court for filing, three of which I have received due notice were filed on April 5, 1996: (a) Motion To Recall Mandate, (2) Motion for Reconsideration En Banc of 3/21/96 Denial of Motion for Order To Show Cause, etc., and (3) Motion for Reconsideration En Banc of 3/21/96 Denial of Motion To Dismiss, etc. My understanding is that these motions as a matter of course are submitted to the merits panel.

2. For the reasons set forth in Appellant's *in camera* submissions to Chief Judge Wallace, lastly on April 1, 1996 [sic: was filed], Appellant objects to the consideration of these and any further motions by his merits panel; Appellant has a constitutional right to a decision of this Court authored by a Constitutionally qualified Judge, and a constitutional right to a three-judge panel by prescribed rules of Court not influenced or otherwise prejudiced by deliberations involving a Judge Constitutionally unqualified. The entire merits panel of Judges Poole, Fletcher, and O'Scannlain is therefore formally by this Affidavit of Disqualification objected to, for the grounds set forth in the said submissions to Chief Judge Wallace *in camera*, incorporated herein by this reference, as disqualified to further act in this Appeal by this Affidavit for those reasons.

3. Further, being disqualified for cause, Appellant requests that the Memorandum decision of December 22, 1995, in its entirety be withdrawn, as the product of a disqualified merits panel, and that this Appeal be assigned to a different merits panel.

4. This Declaration is being submitted in good faith and not for purposes of delay, so that this Appellant may not be further prejudiced.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED THIS 11TH DAY OF APRIL 1996 AT LOMPOC, CALIFORNIA.

/s/ Gary Victor Dubin
GARY VICTOR DUBIN

PROOF OF SERVICE BY MAIL

I hereby certify that on April 11, 1996, I served upon Leslie Osborne, Jr., Esq., Assistant U.S. Attorney, representing Appellee, a true copy of the foregoing by U.S. Mail, first class postage prepaid, in a sealed envelope, in the mail depository at Lompoc FCI, addressed as follows:

Leslie Osborne, Jr., Esq.
Assistant U.S. Attorney
Federal Building, Room 6100
300 Ala Moana Blvd.
Honolulu, Hawaii 96850

I further certify that in said paper duly served I informed Mr. Osborne that three motions of the five previously submitted to him as unfiled copies had been filed, described therein, and Appellee is therefore invited to oppose said Motions by filing opposition papers within the time prescribed by court rules or in the absence of any such opposition to concede the merits of same.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 11th day of April 1996 at Lompoc, California.

/s/ Gary Victor Dubin
GARY VICTOR DUBIN

APPENDIX 31

IRS NOTICE TO PETITIONER (5/9/88)

Department of the Treasury
Internal Revenue Service
FRESNO, CA 93888

MAY 09, 1988

GARY VICTOR DUBIN
46 403 HAIKU PLANTATIONS DR
KANEOHE HI 96744

Dear Gary Victor Dubin:

Thank you for your reply to our inquiry received Oct. 15, 1987, about Form 1040 for tax period ended Dec. 31, 1985.

In reviewing your account, we find we need additional information.

Please return one copy of this letter with the information within 10 days from the date of this letter, making sure that you sign in the space provided below.

If you do not send us this information, your account may reflect inaccurate or incomplete information. This will result in additional account problems that we would like to avoid.

Our records show that you had income of $13,384.00 during 1985 from interest which meets the minimum required for filing a Federal tax return. Please complete the enclosed Form 1040 and return it with your check or money order for the amount due, within 10 days from the date of this letter.

All pension, interest, dividend, and other miscellaneous amounts, as well as salaries and wages paid to individuals are reported to the Internal Revenue Service – by payers and employers. Most of these payments are taxable income to the individuals who receive them. Our records show that your income was sufficient to require you to file a Federal income tax return. Please complete the enclosed Form 1040 and return it to us with your check or money order for the amount due.

If you have any questions about this letter, write to us at the address shown on this letter and attach this letter to help us

identify your account. You should include your telephone number and the most convenient time for us to call in case we need additional information.

If you prefer, you may call the IRS telephone number listed in your local directory. An Employee there may be able to help you, but the office at the address shown on this letter is most familiar with your case.

One copy of this letter should be retained for your records. We have enclosed an addressed envelope for your convenience.

If you do not respond within 10 days, we may prepare the tax return for you, and bill you for any balance due.

Thank you for your cooperation.

Sincerely yours,

/s/ G. L. Joly
G. L. Joly
Chief, Inquiry and
Support Section

APPENDIX 32

PETITIONER'S LETTER TO IRS (5/20/88)

GARY VICTOR DUBIN
ATTORNEY AT LAW
SUITE 1915
GROSVENOR CENTER
733 BISHOP STREET
HONOLULU, HAWAII 96813

(808) 537-2300
May 20, 1988

G. L. Joly
Chief, inquiry and Support Section
Internal Revenue Service
Fresno, CA 93888

RE: 553-48-0553 (1985 Return)

Dear Sir:

Thank you for your letter of May 9, 1988, a copy of which is enclosed to facilitate reference.

The interest income to which you refer occurred in my business account as you will note from the bank's report to you, and was not individual income.

First, the interest income paid out by my firm was several times *greater* than that reported to you in my business account, so there was no net interest income earned from my trade accounts.

Second, losses in my business that year *exceeded* all income from all sources; hence my business net income was less than the reporting requirements, less than zero.

Please know that, for the purpose of securing tax deductions for future return years as a result of losses in 1985, I am now preparing the 1985 return and it will be filed in a few weeks, the precise filing time depending upon my trial schedule, not for the purposes specified in your letter but in order to claim the losses.

I trust that this additional information clarifies the interest item reported to you by my bank for my business account in 1985; please let me know if I can provide your office with any additional information at this time.

Very truly yours,

/s/ Gary Victor Dubin
Gary Victor Dubin

GVD/o

APPENDIX 33

IRS LETTER TO PETITIONER (12/20/88)

LOGO Department of the Treasury
Internal Revenue Service
Fresno, CA 93888

Gary Victor Dubin

Problem Resolution Office

553-48-0554

1040 1985 & 1986

Date:
12-20-88

Re: Your Inquiry Dated
12-2-88

Dear Tax payer,

We received your letter concerning Form 1040 for the tax periods ending December 31, 1985 and 1986. We have corrected our records to show that you are not required to file for 1985 and 1986 Form 1040. The reason this problem occurred is because your bank has the interest income as individual and it should be reported as business income. We apologize for the delay in responding and any inconvenience we may have caused.

Sincerely
/s/ Julia Morean

Title:
Tax Examiner

Employee No.: 89725511

APPENDIX 34

IRS NOTICE TO PETITIONER (9/12/90)

Sep. 12, 1990

LOGO Department of the Treasury
Internal Revenue Service

FRESNO, CA 93888

GARY VICTOR DUBIN
46 403 HAIKU PLANTATIONS DR
KANEOHE HI 96744

Dear Taxpayer:

Thank you for your reply to our inquiry received Aug. 30, 1990, about your Form 1040 for tax period ended Dec. 31, 1988.

You may be liable to file a return since our records indicate that you paid mortgage interest of more than $8,000. If you still feel that you are not liable to file a return, please send us additional information on the income used to make the mortgage payments.

If you still disagree, please state the reasons why and secure a statement from the financial institution stating the reason why this income is not taxable. Otherwise, please complete and return the enclosed forms.

If you have any questions about this letter, write us at the address shown above and attach this letter to help us identify your account. You should include your telephone number and the most convenient time for us to call in case us need additional information.

If you prefer, you may call the IRS telephone number listed in your local directory. An employee there may be able to help you, but the office at the address shown on this letter is most familiar with your case.

Please return one copy of this letter with your return or an explanation within two weeks, making sure that you sign in the space provided below.

Thank you for your cooperation.

Sincerely yours,

/s/ P. J. Bazick
P. J. Bazick

APPENDIX 35

PETITIONER'S LETTER TO IRS (9/25/90)

GARY VICTOR DUBIN
Attorney at Law
Suite 1915
733 Bishop Street
Honolulu, Hawaii 96813
(808) 537-2300

September 25, 1990

Dear Sirs:

In response to the attached inquiry, please note that you are misinformed. At least 70% of the mortgage interest paid that you refer to is payment on business property (which allocation has been approved by your IRS Office in Honolulu in conjunction with earlier year audit). As a sole practitioner my income is subject to Schedule C first; income becomes reduced by deductions such as depreciation that lower income figures. My bank can be of no help as to my tax liability. As explained, income below level reportable for 1988.

/s/ Gary V. Dubin

APPENDIX 36

1986 Form 1040 (Page 1)

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7. Wages, salaries, etc.
8. Interest income * * *
12. Business income or (loss) (attach Schedule C) * * *
18. Rents, royalties, partnerships, estates, trust, et. * * *

---

23. Add the amounts shown . . . for lines 7 through 22. This is your total income. * * *

---

32. Subtract line 31 from line 23. This is your adjusted gross income

---

APPENDIX 37

Affidavit Regarding Son's Illness (USDC 8/30/93)

My son Scott was my whole life. He was a wonderful lad – bright, handsome, well-mannered; we had so many dreams and plans. He was my only child and my best friend. I was a single parent. Scott almost died in 1985 and the diagnosis was diabetes; no one thought to look for anything else. Scott got better but suffered from much fatigue and joint pains. He was in college, happily married, and a heterosexual, so only later did they finally test for HIV, and he tested positive. That was the worst day of our lives when we got the news. Since then I cannot fully explain the pain and suffering and horror of that disease. . . . He finally had to come home to me. . . . Eventually he collapsed, was in Queens in intensive care for about four months, could not talk, walk, hear, urinate – it was terrible; . . . there was no time to respond to Ms. Nakasone's telephone calls. . . . Without my son, life for me is extremely difficult. . . . I stopped life support.

APPENDIX 38

1986, 1987, 1988 Net Business Losses (9th Cir. 2/9/95)

	1986	1987	1988
FEES RECEIVED:	164,986.57	271,044.90	257,692.18
OFFICE COSTS:	(451,467.33)	(290,743.75)	(292,912.91)
law books	11,795.64	13,981.22	17,367.27
auto expenses	5,548.78	3,360.25	7,717.37
travel expenses	4,581.55	892.97	0.00
taxes paid	15,466.62	24,409.90	17,723.66
insurance, maint.	4,182.77	10,930.16	11,759.87
utilities	15,713.14	12,841.94	12,851.91
entertainment	3,026.43	2,582.35	5,796.23
mortgage interest	38,588.15	47,806.99	49,006.99
supplies, rentals	58,248.24	17,560.01	16,761.99
auto leases	17,477.84	11,431.68	11,431.68
business gifts	635.00	187.29	13.50
bar dues	550.00	721.00	857.00
rental & storage	8,085.00	11,495.53	8,437.50
computer leasing	4,325.46	9,914.34	6,665.18

(CONTINUED ON NEXT PAGE)

(CONTINUED FROM PRIOR PAGE)

	1986	1987	1988
FEES RECEIVED:	164,986.57	271,044.90	257,692.28
OFFICE COSTS:	(451,467.33)	(290,743.75)	(292,912.91)
fees to others	65,980.20	55,246.36	36,446.36
business interest	1,918.65	6,809.71	2,146.56
casualty losses	5,692.22	0.00	0.00
misc. case costs	0.00	19,725.09	9,565.80
client bad debts	136,055.64	0.00	0.00
depreciation	53,596.00	54,466.38	78,364.04
INVESTMENT CREDIT:	(2,583.00)	(2,583.00)	(2,583.00)
OPERATING LOSS CARRYOVER:	(22,582.29)	(309,063.05)	(328,761.90)
NET LOSS:	(286,480.76)	(19,698.85)	(35,220.73)

APPENDIX 39

Minutes of 2/9/73 IRS Conference (9th Cir. 2/9/95)

Mr. Howard reported a change of attitude in federal judges in San Francisco after he met with a number of them and discussed the gravity of the Tax Rebellion Movement and the importance of giving prison sentences as deterrents.

There was a general discussion of the importance of meeting with U.S. Attorneys and federal judges. . . . Mr. Howard advised that after his discussion with the federal judges they said they had not full background information on some of the defendants to whom they had given light sentences.

APPENDIX 40

Declaration Regarding Conditions Of Confinement At Terminal Island (9th Cir. 2/23/96)

a. I am confined with other inmates mostly serving ten year sentences or more, some for life, many for violent crimes involving drugs, guns, and explosives;

b. Inmates are confined in a variety of cells", some resembling Western-Movie-style cells with bars, within nine separate units, each having locked doors with bars on the windows, which are opened to the Yard only at certain controlled-movement periods and off-duty hours;

c. Various locked gates and razor-wire fences, from eight to thirty feet high surround the perimeter, watched over by three sky-high gun towers;

d. Inmates are counted several times daily, and assigned compulsory work details, some less demanding than would be the stamping out of license plates;

e. Inmates are given uniforms to wear, their hours of sleep are regulated, as is their choice of food and medical services determined for them, and they are urine-tested and breath-tested randomly.

f. Smoking of cigarettes and cigars and pipes is tolerated in cells, even though inmates such as I have never previously smoked and despite the U.S. Surgeon General's Report on Second-Hand Smoke;

g. There have been stabbings here among inmates and recently a destructive riot in one whole wing of the prison; and

h. Upon arriving here or leaving here inmates are strip-searched, and waist-chained, leg-chained, and handcuffed upon departure and transported in armored vans and buses in shackles, including to airlift strips protected by Marshalls with high-powered rifles and bazookas.

APPENDIX 41

Trial Transcript (USDC 9/14/94) (pp. 18-19)

MR. DUBIN: I just don't feel capable of cross-examining . . . Last night, after I left this court, I had an hour and a half in transportation, about an hour and a half waiting around in a cell while I was strip-searched and processed; another half an hour here before we left; got to my cell, which is a concrete – almost like concrete slab with a light overhead, at about 7:30. Nine o'clock you go to sleep there with a light over your head. Woke up about 6:00. I couldn't sleep under those conditions. . . .

THE COURT: Lawyers always work without sleep, Mr. Dubin.

APPENDIX 42

USDC DOCKET SHEET

8/13/93	1	INFORMATION BY USA Gary Victor Dubin (1) count(s) 1-3 (eps) [Entry date 08/18/93]
8/13/93	2	Ex Parte Motion To Seal MOTION, Declaration of Leslie E. Osborne, Jr.; PROPOSED Order Granting Motion To Seal Declaration, Application For Order And Information to seal case by USA as to Gary Victor Dubin (eps) [Entry date 08/18/93] [Edit date 08/18/93]
8/13/93	3	PS issued as to Gary Victor Dubin; arraignment set for 10:30 8/27/93 for Gary Victor Dubin before Mag Judge Barry M. Kurren (eps) [Entry date 08/18/93]
8/17/93	4	EO: MINUTES – SEALED CASE. PS to issue; retn 8/27/93 at 10:30 BMK. Osborne notified by phone. by Mag Judge KURREN (eps) [Entry date 08/18/93]
8/25/93	6	PS executed on 8/20/93 as to Gary Victor Dubin (gb) [Entry date 09/08/93]
8/26/93	5	DECLARATION of the Government's Position In Re. Sealed Proceedings by USA (eps) [Entry date 08/27/93]
8/27/93	7	EP: MINUTES: A&P – dft Gary Victor Dubin present. Information unsealed. Arrn. waived. Plea of not guilty entered; Consent to be tried by U.S. Magistrate and Waiver of Jury Trial signed. Dates given: NJT: 1-11-94 @ 9, BMK. Motions due: 10-15-93. Response by 10-29-93. Osborne to prepare order re excludable time due to continuity of counsel. Court to review M/Dismiss in camera. Bail set at $10,000.00 signature bond. No special conditions. Attorney Gary Victor Dubin present;, ___; trial set for 9:00 1/11/94 for Gary Victor Dubin USA Attorney Gary Victor Dubin, Leslie E. Osborne Jr.

present (TC) by Mag Judge KURREN (gb) [Entry date 09/08/93]

8/273/93 8 ORDER Granting Motion to Seal Declaration, Ex Parte Motion (Application) For Order and Information by Mag Judge Barry M. Kurren (gb) [Entry date 09/08/93]

8/27/93 9 CONSENT to proceed before Mag Judge Barry M. Kurren on a misdemeanor by Gary Victor Dubin (gb) [Entry date 09/08/93]

8/27/93 10 ORDER Setting Conditions of release for Gary Victor Dubin ($10,000.00 Signature posted) by Mag Judge Barry M. Kurren (gb) [Entry date 09/08/93]

8/27/93 11 APPEARANCE BOND ($10,000.00 signature) posted by Gary Victor Dubin 46-403 Haiku Plantations Drive; Kaneohe, HI 96744 Ph. 247-1111 signed by Judge KURREN (gb) [Entry date 09/08/93]

8/30/93 12 Notice of Motion and MOTION Defendant's Motion for dismissal and Judgment of Acquittal; Affidavit of Gary Victor Dubin; Exhibits 1-19; Certificate of Service Motion hearing set for 9/20/93 (gb) [Entry date 09/08/93]

9/7/93 13 Government's Opposition to Defendant's Motion for dismissal and Judgment of Acquittal Certificate of Service (gb) [Entry date 09/16/93]

9/20/93 14 EP: MINUTES: denying motion Defendant's Motion for dismissal and Judgment of Acquittal Osborne to prepare order. Attorney Gary Victor Dubin, Leslie E. Osborne Jr. present (ESR) by Mag Judge KURREN (gb) [Entry date 09/27/93]

9/20/93 15 Summary of Oral Argument For Defendant's Motion for Dismissal and Judgment of Acquittal for Hearing to be held September 20, 1993; Exhibits "A" through "I", Certificate of Service (gb) [Entry date 09/27/93]

9/27/93 16 Notice of Proposed Order; Order Finding Excluding Time; Certificate of Service (gb) [Entry date 10/05/93]

10/1/93 17 Defendant's OBJECTIONS to Proposed Order Finding Excludable Time; Certificate of Service by defendant Gary Victor Dubin (gb) [Entry date 10/18/93]

10/6/93 18 ORDER by Mag Judge Barry M. Kurren ___; trial set for 9:00 1/11/94 for Gary Victor Dubin, (cc: all counsel) (gb) [Entry date 10/18/93]

10/19/93 19 NOTICE of Proposed Order; Order Denying Defendant's Motion for Dismissal, or in the Alternative, Judgment of Acquittal; Certificate of Service by plaintiff USA (gb) [Entry date 10/26/93]

10/29/93 20 Defendant's OBJECTIONS to Proposed Order Denying Defendant's Motion for Dismissal, or in the Alternative, Judgment of Acquittal; Certificate of Service by defendant Gary Victor Dubin (gb) [Entry date 11/05/93]

12/7/93 21 ORDER Denying Defendant's Motion for Dismissal, or in the Alternative, Judgment of Acquittal by Mag Judge Barry M. Kurren (cc: all counsel) (gb) [Entry date 12/14/93]

12/8/93 22 EO: MINUTES NJT cont from 1/11/94 to 9:00 a.m. 5/3/94, BMK for Gary Victor Dubin Gary Victor Dubin will be out of town on 1-11-94. Osborne to prepare order excluding time from 1-11-94 to 5-3-94. by Mag judge KURREN (gb) [Entry date 12/16/93]

12/17/93 23 STIPULATION to Continue Trial; and order by Mag Judge Barry M. Kurren; trial set for 9:00 5/3/94 for Gary Victor Dubin, (gb) [Entry date 01/10/94]

1/25/94 24 Notice of Motion and MOTION to compel the deposition of John Godfrey by USA as to Gary Victor Dubin Motion hearing set for 2/17/94 @ 10:30 a.m. (BMK) (gb) [Entry date 01/28/94]

2/11/94 25 Defendant's MEMORANDUM in opposition to motion to compel the deposition of John Godfrey filed January 25, 1994 by USA as to Gary Victor Dubin [24-1] by defendant Gary Victor Dubin; Certificate of Service (gb) [Entry date 02/16/94]

2/16/94 26 STIPULATION Waiving Oral Argument (gb) [Entry date 02/17/94]

2/17/94 27 EO: MINUTES M/Compel set for 2/17/94 taken off calendar. Parties will submit on the pleadings. Court to prepare order. Judge KURREN (gb) [Entry date 02/28/94]

2/22/94 28 ORDER by Mag Judge Barry M. Kurren denying motion to compel the deposition of John Godfrey by USA as to Gary Victor Dubin [24-1] (cc: all counsel) (gb) [Entry date 02/28/94]

4/26/94 29 STIPULATION to Continue Trial; and order by Mag Judge Barry M. Kurren; trial set for 9:00 8/2/94 for Gary Victor Dubin, Time from 05/93/94 to 08/02/94 is excludable under 18:2161(h)(8)(A)(B)(iv)(ii) (gb) [Entry date 05/02/94]

7/25/94 30 EO: MINUTES Non Jury trial presently set for 08/02/94 is hereby continued to 8/8/94 @ 10:00 a.m. before Visiting Judge Manuel L. Real for Gary Victor Dubin by Judge MANUEL L. REAL (gb) [Entry date 07/31/94]

7/26/94 31 EX PARTE MOTION by defendant Gary Victor Dubin shorten time determination of defendant's Motion to continued trial date Affidavit of Gary Vicgtor [sic] Dubin; Exhibit "A"; Certificate of Service; set for 2:00 7/29/94 before Mag Judge Barry M. Kurren (gb) [Entry date 07/31/94]

7/26/94 32 Notice of Motion and MOTION to continue trial date by defendant Gary Victor Dubin Affidavit of Gary Victor Dubin Affidavit of Allan

R. Kunimoto, M.D.; Certificate of Service; Motion hearing set for 07/29/94 @ 2:00 p.m. (BMK) (gb) [Entry date 07/31/94]

7/28/94 33 EO: MINUTES Deft's M/Continue Trial date presently set for 07/29/94 is hereby taken off. Court will rule on this Motion without a hearing. by Mag Judge KURREN (gb) [Entry date 08/03/94]

8/1/94 34 EO: MINUTES Non jury trial presently set for 08/08/94 is hereby continued to 9/13/94 @ 9:00 a.m. before Visiting Judge Manuel L. Real for Gary Victor Dubin Mr. Osborne to prepare order reflecting excludable time. cc: All counsel of record. by Judge MANUEL L. REAL (gb) [Entry date 08/03/94]

8/22/94 35 ORDER by Mag Judge Barry M. Kurren; jury trial set for 9:00 9/13/94 for Gary Victor Dubin as to Gary Victor Dubin, Time from 08/08/94 to 09/13/94 is excluded under the Speedy Trial Act (gab) [Entry date 08/25/94]

8/29/94 36 EX PARTE Application by defendant Gary Victor Dubin to shorten time for determination of defendant's motion to rehear and/or reconsider as to length of continuance defendant's motion filed july 26, 1994, to continue trial date, or, in the alternative, motion for further continuance; Affidavit of Gary Victor Dubin; Exhibits 1 through 4; Certificate of Service before Mag Judge Barry M. Kurren (gab) [Entry date 09/01/94]

8/29/94 37 Notice of Motion and MOTION to rehear and/or reconsider as to length of continuance defendant's motion filed July 26, 1994, to continue trial date, or, in the alternative, motion for further continuance by defendant Gary Victor Dubin Affidavit of Gary Victor Dubin; affidavit of Allan R. Kunimoto, M.D.; Exhibits 1 through 3; Certificate of Service (gab) [Entry date 09/01/94]

8/30/94 38 EO: MINUTES Motion to continue trial filed 08/29/94 is set for 09/07/94 @ 3:00 p.m. before Judge KURREN. cc: Gary Victor Dubin, Leslie Osborne (gab) [Entry date 09/01/94]

8/31/94 39 ORDER by Mag Judge Barry M. Kurren granting motion to shorten time for determination of defendant's motion to rehear and/or reconsider as to length of continuance defendant's motion filed july 26, 1994, to continue trial date, or, in the alternative, motion for further continuance; [36-1] setting hearing on motion to rehear and/or reconsider as to length of continuance defendant's motion filed July 26, 1994, to continue trial date, or, in the alternative, motion for further continuance by defendant Gary Victor Dubin [37-1] 3:00 9/7/94 (gab) [Entry date 09/01/94]

9/6/94 40 Government's opposition to defendant's motion to continue trial by plaintiff USA; Statement of Facts and Statement of the Law; Certificate of Service (gab) [Entry date 09/12/94]

9/7/94 41 EP: MINUTES: M/Continue Trial – deft. present by phone. Thomas Feeney CST. Motion denied. Gary Dubin by phone, Leslie E. Osborne Jr. present (ESR) by Mag Judge KURREN (gab) [Entry date 09/12/94]

9/7/94 42 AFFIDAVIT of Debbie Barfield by defendant Gary Victor Dubin (gab) [Entry date 09/12/94]

9/8/94 43 AFFIDAVIT of defendant Gary Victor Dubin Requesting Local Rule 110-4(b) Referral; Exhibit "A"; Certificate of Service (gab) [Entry date 09/12/94]

9/9/94 44 EX PARTE MOTION by defendant Gary Victor Dubin shorten time for hearing set for 1:30 9/12/94 before Mag Judge Barry M. Kurren – Declaration of Benjamin B. Cassiday, III; ORDER Granting Ex Parte Motion to Shorten Time – by Mag. Judge KURREN (gab) [Entry date 09/12/94]

9/12/94 45 Notice of Motion; MOTION to continue trial date by defendant Gary Victor Dubin Affidavit of Benjamin B. Cassiday, III; Motion hearing set for 09/12/94 @ 1:30 p.m. (BMK); Certificate of Service (gab) [Entry date 09/12/94]

9/12/94 46 Notice of Motion and MOTION for special appearance of Benjamin B. Cassiday by defendant Gary Victor Dubin (gab) [Entry date 09/12/94]

9/12/94 47 EP: MINUTES: denying motion for special appearance of Benjamin B. Cassiday by defendant Gary Victor Dubin [46-1] denying motion to continue trial date by defendant Gary Victor Dubin [45-1]; trial set for 9:00 9/13/94 for Gary Victor Dubin; attorney Gary Victor Dubin, Leslie E. Osborne Jr. present (ESR) by Judge MANUEL L. REAL (eps) [Entry date 09/15/94]

9/12/94 48 ORDER DENYING Defendant's Motion To Continue Trial And Re: Request For Local Rule 110-4(b) referral by Mag Judge Barry M. Kurren (cc: all counsel) (eps) [Entry date 09/15/94]

9/13/94 49 EP: MINUTES: NON JURY TRIAL – Deft not present. Govt's counsel Osborne informed this Court that the deft checked into Queen's Hospital last night for his medical problems regarding his back. Also Cassiday informed the court that he was called by deft late last night to inform Cassiday that he was checking into Queen's Hospital. Court orders warrant issued – NO BAIL – for Gary Victor Dubin Court orders US Atty to obtain a doctor to examine Dubin's medical problems at Queen's Hospital to be accompanied by a U.S. Marshal; Attorney Leslie E. Osborne Jr. present (ESR) by Judge MANUEL L. REAL (eps) [Entry date 09/15/94]

9/13/94 50 ARREST Warrant issued for Gary Victor Dubin – NO BAIL by Judge Manuel L. Real (eps) [Entry date 09/15/94]

9/13/94 51 ARREST Warrant returned executed as to Gary Victor Dubin on 9/13/94 (eps) [Entry date 09/15/94]

9/13/94 52 EP: NJT MINUTES: NJT – (1st Day) began as to Gary Victor Dubin, Court admits court exhib 1 – Letter addressed to whom it may concern regarding deft's mental health from Dr. Mary-Louise DeVegvar, MD. This Court finds the deft to be physically & mentally fit to participate in this NJT. Court hereby REVOKES dft Gary Victor Dubin's bond Deft remanded to custody of USM. Govt Witness: Vonel Vaiwaiole, CST, Scott Takahashi, CST, Albert Higuera CST, William H. Benge CST, Robert Bjerke CST, Denise Kaehu CST, Jacob Tsur CST, Arthur Wiener CST, Eduard Holt CST, Russell Chee CST, Brian Matsuura CST, Morio Omori CST & John Stafford CST. Govt Exhib 1, 1A, 1B, 1C, 1D, 1E & 1F, 1I, 1J, 1K, 2, 3, 4, 6, 6A, 6B, 6C, 6D1, 162 thru 528, 529 thru 612, 613 thru 652A, 696B thru 696K, 696L thru 696Q, 697 thru 720, 721 thru 725, 726, 727 thru 731, 732 thru 733, 734, 735, 736, 737, 772, 773, 778, 779, 780, 828, 829 & 835 Admitted. Further NJT contd to 9-14-94 at 9 (MLR); Gary Victor Dubin Attorney Leslie E. Osborne Jr. present (ESR) by Judge MANUEL L. REAL (eps) [Entry date 09/19/94]

9/13/94 – ARREST of defendant Gary Victor Dubin on 9/13/94 (eps) [Entry date 09/20/94]

9/14/94 53 EP: MINUTES: Further NJT – 2nd Day. Govt witnesses: Gilbert Matsumoto CST, Leatrice Kauahi CST, Russell Chong CST, Janet Nakasone CST, John W. Godfrey CST, Russell Bain CST. Govt Exhib 8a, 9a, 9, 9a, 10, 11, 12, 13, 14, 15-52, 53-91, 130, 131, 132, 134, 135, 136, 137, 137a, 746 thru 748, 749 thru 754, 755, thru 756, 757 thru 760A, 763, 764, 765, 766, 767, 768, 769, 770, 771, 771A, 771D &

776-1 thru 776-132 admitted. Govt rested. Deft's Oral M/Judgment of Acquittal – DENIED. Deft witness: Gary Dubin, CST. Closing Statements on behalf of the govt & the deft. Court find the deft Gary Victor Dubin (1) count(s) 1-3 guilty, Deft referred to prob office for prep of presentence report; sentencing hearing set for 1:30 (MLR) 1/23/95 for Gary Victor Dubin, $250,000 CASH/CORP or SECURITY Bond set for Gary Victor Dubin – Spec Conds: 1) Deft not leave Island of Oahu without written consent of court; 2) Deft to report to PTS as directed Osborne to submit findings to this court; Gary Victor Dubin Attorney Leslie E. Osborne Jr. present (ESR) by Judge MANUEL L. REAL (eps) [Entry date 09/20/94]

9/15/94 54 RETURN on Clerks Temporary Commitment – exec by USM – 9/13/94 (eps) [Entry date 09/20/94]

9/15/94 55 AFFIDAVIT re Cash Bail or Security, GARY VICTOR DUBIN ($ $250,000 CASH) – 46-403 Haiku Plantations Dr, Kaneohe, HI 96744, ph: 247-1111 (eps) [Entry date 09/20/94]

9/15/94 56 ORDER Setting Conditions of Release for Gary Victor Dubin ($250,000 CASH w/ spec conds) by Judge Manuel L. Real (eps) [Entry date 09/20/94]

9/15/94 57 APPEARANCE BOND ($250,000 CASH) by Gary Victor Dubin signed by Judge REAL (eps) [Entry date 09/20/94]

10/18/94 58 EO: MINUTES Sentencing as to Cts 1, 2 & 3 presently set for 01/23/95 is hereby continued to 01/09/95 @ 9:00 a.m. before Judge Manuel L. Real for Gary Victor Dubin cc: Mr. Osborne-Assistant U.S. Attorney, Gary Dubin, U.S. Probation Office 7 U.S. Marshal's – by Judge MANUEL REAL (gab) [Entry date 10/20/94]

12/6/94 59 Notice of Motion and MOTION to continue sentencing by defendant Gary Victor Dubin

Affidavit of Benjamin b. Cassiday, III and Certificate of Service; Motion hearing set for (No hearing date set) (gab) [Entry date 12/08/94]

12/8/94 60 EO: continuing hearing on motion to continue sentencing by defendant Gary Victor Dubin [59-1] 10:00 1/9/95 by Gary Victor Dubin – Notified all parties involved in this action by phone – before Judge MANUEL REAL (eps) [Entry date 12/15/94] [Edit date 12/15/94]

12/9/94 61 Government's SENTENCING Statement as to Gary Victor Dubin; Certificate of Service (gab) [Entry date 12/12/94] [Edit date 12/15/94]

12/9/94 62 EP: MINUTES: motion to continue sentence [59-1] of 1/9/95-DENIED; USA Attorney Leslie E. Osborne Jr., Benjamin Cassiday present (TC) by Judge Real (gs) [Entry date 12/16/94]

12/13/94 63 Deft.'s SENTENCING Statement and certificate of service as to Gary Victor Dubin (gs) [Entry date 12/14/94] [Edit date 12/16/94]

12/14/94 – TRANSCRIPT of Proceedings – 9/13/94 – ORIG – (V/ARS) – pp 110 (gs) [Entry date 12/19/94]

12/14/94 – TRANSCRIPT of Proceedings – 9/14/94 – ORIG (V/ARS) – pp 197 (gs) [Entry date 12/19/94]

12/30/94 64 Submission of Proposed FINDINGS of fact and conclusions of law (Exhibit A); Certificate of Service ccd: Judge Manuel L. Real (eps) [Entry date 01/04/95]

1/9/95 65 EP: MINUTES: Sentencing as to CTS 1, 2 & # Evidentiary Hrng – Govt Witness Dr. Wakazawa, CST. Further Evid & Sentencing hearing contd to 10:00 (MLR) 1/13/95 for Gary Victor Dubin Gary Victor Dubin Attorneys Benjamin Cassiday and John Peyton for Leslie Osborne present (Lisa Groulx-Thompson) by Judge MANUEL L. REAL (eps) [Entry date 01/11/95] [Edit date 01/11/95]

1/12/95 66 RESPONSE by plaintiff USA – (Court directed parties to address the question of whether CTS 1 & 2 fall w/in the Sentencing Guidelines) – CT 1 does not fall w/in the Sentencing Guidelines (eps) [Entry date 01/13/95]

1/13/95 67 MOTION for new trial by Gary Victor Dubin Affidavit of Gary Victor Dubin; Exhibits 1 through 8; Certificate of Service – Motion hearing set for (no hearing date requested) (eps) [Entry date 01/13/95]

1/13/95 68 EP: MINUTES – SENTENCING –: denying motion for new trial by Gary Victor Dubin [67-1] CST: Dr. Marie De Begvar [sic], Gary Dubin – sentencing Gary Victor Dubin (1) count(s) 1. CT 1 – Impr 12 months to run consecutively to CTS 2 & 3, Fine $25,000., Gary Victor Dubin (1) count(s) 2-3. CT 2 – Impr 12 months, Sup Rel 1 yr to run consecutively to each other CT 3 – Impr 12 months, Sup Rel 1 yr to run consecutively to each other under the usual conds & the following spec conds: 1) Deft provide the prob office access to any requested financial information; 2) Deft cooperate with the IRS in the filing of all past due tax returns & payment to all taxes owing; 3) Deft pay a fine of $25,000 as to CT 1, $150,000 as to CTS 2 & 3, to run concurrently; 4) Deft to pay cost of prosecution of $6,685.71. Spec Mon Assess – $75.00. Ordered that all fines & assessments be deducted by the Clerk of Court from the cash bail posted by the deft before the bail money is returned to the deft. Deft's Oral M/Self Surrender– GRANTED. MITTIMUS – 1/30/95 at 12 noon. Deft to report to the USM for designation, case terminated; Gary Victor Dubin attorney Benjamin B. Cassiday, John F. Peyton Jr. present (ESR) by Judge MANUEL L. REAL (eps) [Entry date 01/17/95]

1/18/95 69 MOTION For Bail Pending Appeal by defendant Gary Victor Dubin Exhibit "A" and Certificate of Service – Motion hearing set for 1/20/95 at 10 (MLR) (eps) [Entry date 01/19/95]

1/18/95 70 EO: MINUTES – Deft's M/Bail Pending Appeal set for 1/20/95 at 10:00 (MLR) by Mag Judge MANUEL L. REAL (eps) [Entry date 01/19/95]

1/19/95 71 Government's Opposition To Defendant's Motion For Bail Pending Appeal by defendant Gary Victor Dubin [69-1]; certificate of Service by plaintiff USA (eps) [Entry date 01/23/95]

1/20/95 72 FINDINGS of Fact by Judge Manuel L. Real (cc: all counsel) (eps) [Entry date 01/23/95]

1/20/95 73 EP: MINUTES: denying motion For Bail Pending Appeal by defendant Gary Victor Dubin [69-1] CT 1 – Impr 12 months to run consecutively to CTS 2 & 3, Fine $25,000. – Spec Assess – $25.00 (Resentencing on 1/20/95) – The sentence will remain the same except as to the fine Count(s) 2-3. CT 2 – Impr 12 months, Sup Rel 1 yr to run consecutively to each other CT 3 – Impr 12 months, Sup Rel 1 yr to run consecutively to each other under the usual conds & the following spec conds: 1) Deft provide the prob office access to any requested financial information; 2) Deft cooperate with the IRS in the filing of all past due tax returns & payment to all taxes owing; 3) Deft pay a fine of $25,000 as to CT 1, $100,000 as to CTS 2 & 3, to run concurrently; Fine imposed in CT 3 to run concurrent to fine imposed in CT 2. Said fine in CTS 2 & 3 to run consec to the fine imposed in CT 1; 4) Deft to pay cost of prosecution of $6,685.71. Spec Mon Assess – $50.00. Ordered that all fines & assessments be deducted by the Clerk of Court from the cash

bail posted by the deft before the bail money is returned to the deft. The sentence will remain the same except as to the fine section Deft adv of his right to appeal; Gary Victor Dubin Attorney Benjamin B. Cassiday, John F. Peyton Jr. present (ESR) by Judge MANUEL L. REAL (eps) [Entry date 01/30/95]

1/20/95 74 JUDGMENT and Commitment as to Gary Victor Dubin by Judge Manuel L. Real – as to Sentencing proceedings on 1/13/95 and 1/20/95 (cc: all counsel and Financial) (eps) [Entry date 01/30/95]

1/20/95 75 NOTICE OF APPEAL by defendant Gary Victor Dubin regarding [74-1] fees receipt #158682 – $105 (eps) [Entry date 01/30/95]

1/20/95 76 ORDER FOR TIME SCHEDULE RT to be ordered by 2/10/95 ___; RT to be filed by 3/12/95; Aple's brief to be filed by 4/21/95; Reply brief to be filed by 5/21/95; Aple's opt reply brief to be filed by 6/4/95 (cc: Clerk, 9CCA, all counsel, Court Reporters) Notice of Appeal sent to Clerk, 9CCA and to all counsel (eps) [Entry date 01/30/95]

1/23/95 – Transcript of Proceedings 1/13/95 – Orig; # of pages 45; V/ARS; Deft 01 (eps) [Entry date 01/30/95]

1/25/95 77 APPEAL Transcript Designation and Order form Terrence Chun 8/27/93, Lisa Groulx-Thompson 1/9/95, ESR 9/20/93, 9/7/94, 9/12/94, 9/13-14/94, 1/13/95, 1/20/95 regarding [75-1] (eps) [Entry date 01/30/95]

1/27/95 – TRANSCRIPT of Proceedings – (hearing date not indicated on title page or within body of transcript (referencing only M/Dismiss) – ORIG – (Audiotape transcription/Cynthia Hashimi) – pp 33 (eps) [Entry date 01/30/95]

1/27/95 78 EO: MINUTES – Regarding Deft's Self Surrender to a designated facility. The USM thru

DUSM Wayne Kalima informed the Clerk's Office that the designation will not be coming out from the BOP until 1/30/95. Deft's Counsel B. Cassiday was called up by courtroom deputy L. Sai & informed of this fact & it was suggested to Mr. Cassiday to file a M/Extend the Mittimus. Also an attached letter addressed to the USM re Dubin/Appellant's M/Bail Pending Appeal by deft's appeal Atty Karen Landau – by Judge MANUEL L. REAL (eps) [Entry date 01/30/95]

1/27/95 79 MOTION to Stay Mittimus by defendant Gary Victor Dubin Declaration of Counsel and Certificate of Service – Motion hearing set for no hearing date requested. (requesting stay of mittimus to 2/6/95) ccd: Real by FAX (eps) [Entry date 01/30/95]

1/30/95 80 EO: MINUTES – Deft's M/Stay MITTIMUS filed by atty B. Cassiday for defendant Gary Victor Dubin [79-1] moot. An attached order from the 9CCA was faxed to our office this morning regarding the 9CCA has granted a temporary stay of the district court's order of 1/20/95. A copy of this order was given to the USM, Peyton, Cassiday by Judge MANUEL L. REAL (eps) [Entry date 01/30/95]

2/2/95 – Transcript of Proceedings 1/20/95 – Orig # of pages 8; V/ARS (eps) [Entry date 02/03/95]

2/3/95 81 PRESENTENCE Report on Gary Victor Dubin (original sealed and held in probation office). (eps) [Entry date 02/03/95]

2/3/95 82 SENTENCING RECOMMENDATION as to Gary Victor Dubin (original sealed and held in probation office) (eps) [Entry date 02/03/95]

2/8/95 83 Satisfaction of Judgment by USA (eps) [Entry date 02/09/95]

2/10/95 84 ORDER by Judge Helen Gillmor for Judge Manuel L. Real re [80-1] deft's M/Stay Mittimus pending appeal – 9CCA Denied M/Bail

pending appeal & the stay of the district court having been lifted – deft shall surrender to FPC Boron no later than 2pm CST, 2/13/95 – by USA (eps) [Entry date 02/10/95]

2/21/95 – Transcript of Proceedings 9/12/94 – Orig; # of pages 5; V/ARS (eps) [Entry date 02/22/95]

2/24/95 – Transcript of Proceedings 8/27/93 – Orig; # of pages 14; Terrence Chun (eps) [Entry date 03/03/95]

3/1/95 – Transcript of Proceedings 9/7/94 – Orig; # of pages 22; Lisa Groulx Thompson (eps) [Entry date 03/03/95]

3/1/95 – Transcript of Proceedings 1/9/95 – Orig; # of pages 15; Lisa Groulx Thompson (eps) [Entry date 03/03/95]

3/2/95 85 JUDGMENT and Commitment returned executed on 2/13/95 as to Gary Victor Dubin (1) count(s) 1, 2-3 to FPC Boron, Boron, CA – ccd: Financial (eps) [Entry date 03/03/95]

3/22/95 86 APPEAL Certificate of Record Transmitted to 9CCA regarding [75-1] (cc: all counsel) (eps) [Entry date 03/22/95]

Supreme Court, U.S.
FILED
SEP 4 1996
CLERK

No. 96-232

In The

Supreme Court of the United States

October Term, 1995

GARY VICTOR DUBIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF BY PETITIONER

GARY VICTOR DUBIN
Member, Supreme Court Bar
No. 84958-022
Lompoc FCI
3600 Guard Road
Lompoc, CA 93436
(805) 736-4154

Petitioner

6 pp

NOTICE OF NEW SEVENTH CIRCUIT DECISION

Pursuant to Rule 15.8, Petitioner hereby submits this Supplemental Brief to bring to the Court's attention the recent decision of the Court of Appeals for the Seventh Circuit in *United States v. Beals*, 87 F.3d 854 (1996), reported and discovered by Petitioner after the submission of his pending Petition for Writ of Certiorari, for the following reasons:

1. In Point 2 of his docketed Petition, Petitioner argues that his conviction and sentence on Counts II and III are illegal and unconstitutional *absent indictment*, for which alleged offenses he is presently incarcerated at Lompoc Federal Correctional Institution in California. The basis of his argument is that the recent addition of supervised release to existing Section 7203 failure-to-file twelve-month maximum sentences extends the *possibility* of imprisonment for *each* such offense beyond one year, making charging by Information in violation of Rule 7(a) of the Federal Rules of Criminal Procedure and the Indictment Clause of the Fifth Amendment.[1]

2. Petitioner supports his argument by reference in his Petition to the decision of his own Circuit in *United States v. Soto-Olivas*, 44 F.3d 788 (9th Cir. 1995), interpreting 18 U.S.C. § 3583 to make supervised release the same as a parole term under prior law, so that revocation punishment is part of the original punishment for the original crime and not for the

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[1] Petitioner was charged by Information, although U.S. Attorney erroneously issued "news release" upon arraignment claiming "a Federal Grand Jury indicted Dubin". See Petition, Appendix 28 note printing error at A-45: "indicated" should read "indicted".

supervised release revocation, in order to avoid a panoply of constitutional issues were revocation punishment for the violation itself, given the absence of traditional constitutional rights for those charged with such infractions and returned to prison.[2]

3. Indeed, among Petitioner's supervised release terms are the standard reporting terms as well as a requirement that he must "cooperate with the IRS" or may by a preponderance of the evidence as determined by Judge Manuel Real be returned to prison for up to one additional year for Counts II and III each not only without Indictment but without even Fifth or Sixth Amendment rights to trial by jury, defense counsel, and various due process guarantees otherwise available to criminal defendants such as the presumption of innocence unless proven guilty beyond a reasonable doubt.

4. In deciding *Beals, supra,* the Seventh Circuit has adopted the identical reasoning of the Ninth Circuit in *Soto-Olivas,* as earlier relied upon in *United States v. Paskow,* 11 F.3d 873 (9th Cir. 1993), in holding supervised release revocation imprisonment a part of the original punishment for the original crime committed. Explaining that its theory of legislative interpretation rejects the recidivist statutory analogy in favor of the parole model, the Seventh Circuit joined the Second, Fourth, and Ninth in their interpretation of Section 3583 statutory intent; see *United States v. Meeks,* 25 F.3d 1117 (2d Cir. 1994), *Paskow, supra,* and *United States v.*

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[2] A *term of supervised release* followed by revocation imprisonment is therefore identical in concept to a *term of parole* followed by revocation imprisonment. Neither parole nor supervised release terminate the *term of imprisonment,* but merely change the form of custody conditionally.

Parriett, 974 F.2d 523 (4th Cir. 1992), *Beals* expressly rejecting the opposite view recently voiced by the Sixth Circuit in *United States v. Reese,* 71 F.3d 582 (1995), which rejected *Soto-Olivas, supra.* And it now appears that the Third Circuit may be agreeing with the Sixth; see *United States v. Brady,* 3d Cir., No. 95-3660, decided June 28, 1996, reported in summary form in 59 *Criminal Law Reporter* 1344 (7/17/96) (not yet in advance sheets available to Petitioner).

5. While it is true that *Soto-Olivas* was a double jeopardy case, and *Beals, Meeks, Paskow, Parriett, Reese,* and *Brady* were *ex post facto* decisions, the principle of statutory interpretation is the same, for otherwise the circuit courts would be interpreting Section 3583 one way in deciding one constitutional issue and in an opposite manner with respect to Rule 7(a) and the Indictment Clause. Indeed, in the Indictment context an interpretation contrary to *Beals* would be even more offensive than would appear to be the case had *Beals* followed *Reese,* for as the Seventh Circuit explained in *Beals,* contrary to the analysis for instance in *Brady,* supervised release adds more time to the defendant's sentence than even the traditional parole periods, since with the addition of newly-enacted *subsection h* not only, for example, are failure-to-file "misdemeanants" now subject to the possibility of two years of imprisonment for each Section 7203 offense but also potentially years of supervised release restrictions on their freedom to travel, associate, report, and on their privacy rights.

6. Petitioner is in the peculiar position of supporting his Point 2 with *Soto-Olivas, supra,* a contrary panel decision in his own Circuit which his panel in its unpublished Memorandum chose to ignore, although other panels of the Ninth Circuit continue to adhere to and to extend the reasoning in

Soto-Olivas, most recently in *United States v. Pierce,* 75 F.3d 173, 177 (1996), again holding supervised release to be just like parole, added to the original sentence as the intent of Congress for purposes of applying the Assimilative Crimes Act by adding to an analogous state sentence more imprisonment time.

7. Rule 7(a) recites that "an offense which may be punished by imprisonment for a term exceeding one year- . . . shall be prosecuted by indictment". This Court where possible interprets Congressional intent so as to avoid constitutional issues, *Cheek v. United States,* 498 U.S. 192, 203 (1991). In determining a statute's "plain meaning" it is assumed "Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning", *Pioneer Investment Services v. Brunswick Associates,* 507 U.S. 380, 388 (1993). "There is no more persuasive evidence of the purpose of a statute than by the words by which the legislature undertook to give expression to its wishes," *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571 (1982). If the language is clear, that is where "the inquiry should end", *United States v. Ron Pair Enterprises,* 489 U.S. 235, 241 (1989). And Rule 7(a) is that clear.

8. This Court would have no other way of upholding the constitutionality of Petitioner's sentences on Counts II and III except to depart radically from its historic interpretation of the Indictment Clause and to conclude untenably that an offense such as that charged by a Section 7203 Information exposing a defendant with revocation to up to a total of two years of imprisonment at, for instance, a medium high facility such as Petitioner's recent abode, Terminal Island FCI, and potentially years of on-again, off-again supervised release

terms, which qualify as "custody" for habeas corpus jurisdictional relief, under 18 U.S.C. § 3583(h) did not constitute punishment for an "infamous crime". That would mean that Congress, for instance, could conceivably decide to prescribe a one-year maximum sentence for an offense such as failure-to-file plus say five years or more of supervised release, resulting in imprisonment for six years or more "as part of the original punishment for the original crime" without supposedly violating the Indictment Clause while emasculating that Grand Jury protection.

Circuit Judge Cummings' thoughtful analysis in *Beals* deserves this Court's full attention in the consideration of Petitioner's Point 2 and in the assessment of the challenge to the wisdom of the federal judiciary posed by the uniqueness of supervised release sentencing now perplexing our circuit courts.

Respectfully submitted,

Lompoc FCI
California

September 4, 1996

Gary Victor Dubin
Member, Supreme Court Bar
Petitioner